[redacted]

BRIEF OF RECORD

[redacted]

IN THE SUPREME COURT OF THE UNITED STATES

[redacted]

No. [redacted] 92

[redacted]

MRS. ALICE HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 4 OF CONWAY COUNTY, ARKANSAS, AND E. E. GAITHER, SHERIFF OF CONWAY COUNTY, ARKANSAS

[redacted]

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

[redacted]

(29,693)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 383

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 2, OF CONWAY COUNTY, ARKANSAS, AND R. E. BARTLETT, SHERIFF OF CONWAY COUNTY, ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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[fol. 1] **IN THE SUPREME COURT OF ARKANSAS**

Mrs. M. L. House, Appellant,

vs.

Road Improvement District #2 of Conway County, Arkansas, et al., Appellees.

Stipulation as to Contents of Record—Filed June 13, 1923

It is stipulated that the record herein, excepting issues for consideration presented by the plaintiff in the event that the federal questions raised were decided against her, consist of the following:

1st. The Complaint.

2nd. Amendment to conform to the proof.

3rd. Additional amendment to conform to the proof.

4th. Answer.

5th. Answer to the amendment to the complaint.

6th. Demurrer of defendants.

7th. Act Number 245 of the General Assembly of 1919.

8th. The evidence material to the federal questions, other than those determined by the demurrer, was:

(a) That the notice described in the complaint was as follows:

"Notice of the Assessment of Benefits in Road Improvement District No. 2, Conway County, Arkansas

Notice is hereby given that the assessment of benefits and damages in Road Improvement District No. 2, of Conway County, Arkansas, has been completed and is on file with the Secretary of said Commissioners and is open to investigation and a copy of said assessments of benefits and damages is on file in my office and open to inspection and that said Commissioners for said District will on the [fol. 2] 7th day of July, attend at the First National Bank, Morrilton, Conway County, Arkansas, for the purpose of hearing any complaint upon any of said assessments of benefits or damages. Any complaint of any of said assessments of benefits or damages must be filed with the Secretary of said Commission in writing before the date of said hearing.

Witness my hand and seal as such County Clerk, this 17th day of June, 1919.

J. L. Williams, Clerk."

(b) Testimony was offered by the plaintiff tending to sustain each allegation of the complaint and testimony was offered by the defendants tending to sustain each allegation of the answer. Said testimony was taken in the form of depositions and duly filed before the trial and at the trial the demurrer was first heard and it was sustained as to all allegations of the complaint and the amendments thereto, except as to three non-federal questions, which were set out in the decree, and thereupon the court excluded all of the plaintiff's evidence except as to said three questions mentioned in the decree, which said questions were only considered after a decision against the plaintiff of the federal questions raised in her complaint and the amendments thereto and the testimony which was offered as to said allegations were not questions upon which the defendant could recover independent of the federal questions raised in the complaint and amendment thereto; and it is further stipulated that the evidence on the issues of fact mentioned in the decree and decided by the Chancellor are immaterial to a determination of the federal questions.

(c) The system of assessment referred to in the complaint and the amendments and in the answer, and which was considered by [fol. 3] the court as explanatory of the pleadings was as follows:

The commissioners made the assessment of benefits in June, 1919, and accepted as the basis thereof the 1917 real estate assessments, it then being the last real estate assessment and it had been approved by the county Board of Equalization, and the Commissioners assumed it was correct and made no personal inspection of Mrs. House's lands. They divided the District into three zones and assessed all property in zone 1 at 50% of the 1917 county assessment; in zone 2 at 40%, and zone 3 at 30%. Generally speaking, zone 1 was land within one mile of the road; zone 2 was land within two miles and zone 3 was the balance of the district, with these exceptions:

If land in zone 1 was in another Road District it was placed in zone 2, irrespective of distance from the improvement, and all lands south of the road extending to the river irrespective of distance were placed in zone 1, except so much of it as was in another road district. This was done because there was no other improved road between this road and the River.

This rule was applied to Mrs. House's land, but not exactly. She had 920 acres, also included in District #5 and it was assessed at 33⅓%, except two tracts at 50% and the rest of her land was all assessed at 50%, although much of it was more than two miles from the road, but all of it was between the improved road and the river, and was on account of said location classed as Zone 1, irrespective of distance from the road.

After said assessment of benefits were made and filed but before the hearing on the same in July 7, 1919, the county assessor and the township Board of Assessors, the then assessing officials of the county [fol. 4] reduced Mrs. House's county assessment on the lands included in this district from $43,030.00 to $30,323.00, but this fact

was not known to the Commissioners until long thereafter, and had it been known to them before their benefit assessments became final on July 7, 1919, they would have used it as the basis instead of using the 1917 county assessment as the basis.

(d) The road which was improved by the District was impassible during the rainy seasons before the improvement, but since the improvement has been made it is passible every day in the year. This improved road affords an outlet for the products of Mrs. House's land to the cities of Conway, Morrilton, Plumerville and Little Rock, Arkansas.

(e) Mrs. House lived in Washington, D. C. for eleven years prior to the filing of the complaint and at no time had any agent in Arkansas authorized to act for her in matters of taxation other than in the year 1919, when she retained Mr. C. C. Reid, an attorney of Little Rock, to represent her before the Equalization Board of Conway County, for the purpose of obtaining a reduction in her assessment for State and County purposes.

9th. The decree of the Conway Chancery Court.

10th. All proceedings of the Supreme Court, including the motion for rehearing and the opinion of the court, and the dissenting opinion.

Given under our hands this, the 9th day of June, 1923.
Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Appellant.
Grover T. Owens, S. Lasker Ehrman, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 5] No. 7604

Mrs. M. L. House, Appellant,

vs.

Road Improvement District No. 2 of Conway County et al., Appellees.

Conway Chancery; Clerk, W. E. Atkinson; Ch., $11.50

Transcript—Filed Spet. 2, 1922. W. P. Sadler, Clerk

An appeal is prayed.

Mrs. M. L. House, By Hill & Fitzhugh.

Appeal granted and transcript filed September 2, 1922.

W. P. Sadler, Clerk.

[fol. 6] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS, FEBRUARY TERM, 1922, APRIL 19, 1922

[Title omitted]

CAPTION

Pleas Before Hon. W. E. Atkinson, Judge of the Ninth Chancery District

Appearances: Jos. M. Hill, for plaintiff; Grover Owens, for defendant.

Be it remembered that on the 19th day of April, 1922, the same being an adjourned day of the February 1922 term of the chancery court of Conway County, Arkansas, the Honorable W. E. Atkinson, regular judge of said court present and presiding, the following proceedings were had in the above entitled cause, to wit:

[fol. 7] IN THE CONWAY CHANCERY COURT

[Title omitted]

COMPLAINT IN EQUITY—Filed May 26, 1921

Comes Mrs. M. L. House, plaintiff herein, and complains of the defendants, Road Improvement District No. 2 of Conway County and R. E. Bartlett, sheriff of Conway County, and for her cause of action states:

That she is and has been for the past 4 years a resident of the city of Washington, District of Columbia, and was during all the times in this complaint mentioned.

That she owns in the defendant district lands which were assessed as 3,217 acres, but as a matter of fact her acreage is less on account of *parties* of the lands being carried away by the Arkansas River on which the lands abut.

There is a description of the lands of *her assessed* in said district, together with the distance of each tract from the road improved in said District, and the assessed value of the same and the assessment of benefits of the same hereto attached and made a part of this complaint and marked "Exhibit A." That said lands are assessed at $43,030 and the benefits assessed for the improvement of the road to be improved in said defendant district at $19,035.00, which is to be paid in twenty annual instalments of $1,516.15, amounting in all to $30,323.00.

The General Assembly in 1919 at its regular session passed Act [fol. 8] #245 creating road districts in Conway County, Arkansas, including the defendant road district, which said act was approved on March 11, 1919. That said act was a local and special act and the notice of the intention to apply therefor was not published in

the locality where the lands to be affected were situated thirty (30) days prior to the introduction of the act in the General Assembly and no evidence of such notice was exhibited to the General Assembly before said act was passed and said act was unnecessary as a general law providing for the creation of road districts was in force and could have been made applicable; alleges that said act passed in contravention to sections 25 and 26 of Article V of the Constitution of 1874.

The plaintiff does not allege that said act was void on account of the non-compliance with the provisions of the Constitution and alleges materiality of this allegations is on the subject of notice to her of the proceedings under said act by which a lien was created against her property in favor of the defendant district without her knowledge and alleges that if the provisions of *action* 26 had been complied with, she would have had better opportunity of ascertaining the proceedings against her lands and alleges that if proceedings had been under general law that she would have had more full and ample notice of such proceedings *that* is provided in said special Act No. 245.

Plaintiff alleges that she had no information whatever of the passage of the General Assembly of Act No. 245 until long after proceedings under that act had fixed a lien upon her property as hereinafter stated. That said act provides that the Commissioners of the defendant district should make plans for the improvements contemplated in said act and an estimate of the cost thereof and file the [fol. 9] same with the County Clerk and that immediately thereafter the clerk shall give notice by publication once a week for two weeks in some newspaper published in the county designating the date when the county court will be in session for the submission of said plans, and that the last insertion of said notice to be not less than five days before the consideration of the plans by the county court.

The said act makes it the duty of the county court on said date to consider said plans and hear any landowner interested therein, and to pass upon and adopt said plans or modify the same and when approved by the county court they shall be the plans of the district. That the defendant district proceeded thereunder to form said plans and filed the same without an estimate of the cost thereof and gave a short notice for interested parties to appear, which said notice was less than twenty days, and said plans were approved by the county court on June 14, 1919.

That said act provided that immediately after the approval of the plans by the county court, the commissioners should proceed to make an assessment of benefits to be received by each tract of land in the district and that the assessment list containing the same should remain in the custody of the commissioners and a copy should be filed with the county clerk.

The plaintiff alleges that the filing of said plans without the aggregate cost of the construction of said improvements being stated therein as required by section 16 of said act 245 rendered said proceedings null and void and that the subsequent proceedings of the

county court in approving said plan and the subsequent proceedings of the commissioners in levying assessments against the property in [fol. 10] said district was void as said requirement of the said act was a jurisdictional requirement made in order that the property owners affected might have knowledge of the aggregate costs of the construction of said improvements in that they might object thereto, as provided in section 18 if they had information of said estimated costs of said improvements.

That three days after the plans were approved the commissioners filed the assessments on June 17, 1919, the county clerk issued a notice in the form prescribed in said act #245, dated June 17th, giving notice that said asssessment was on file with the secretary of the *Commissioner* and a copy of it in the county clerk's office, open to inspection, and that the Commissioners would on the 7th of July, attend at the First National Bank of Morrilton, Conway County, Arkansas, for the purpose of hearing any complaint upon said assessment of benefit, and that the complaint of any assessment must be filed with the secretary of the Commission in writing before the date of said hearing.

That said notice was published in the Conway County Unit, a newspaper published in said county on June 18th and on June 25th and published once in the Conway County Democrat on June 19, 1919. That said notice and said act required the plaintiff to file her objections to the assessment of benefits on her land on or before July 6, 1919, and that the first publication being on June 18th, under the rule for computation in section 9756 of Crawford & Moses' Digest there was but sixteen days actual notice given and the said notice was in compliance with said statute.

[fol. 11] The plaintiff alleges that she had no actual notice of this proceeding, saw no copy of the newspaper and had no information whatever as to the creation of the district, or of the proceedings of the commissioners in adopting plans, the orders of the county court in approving the same, nor the proceedings of the commissioners in assessment of her lands with benefits for the constructions of the improvement until long after said dates such proceedings were had.

That said act in section 21 gives any person who *was* complained in writing of his assessment of benefits and who feels aggrieved by the action of the commissioners after the hearing and any other person whatever who may have objection to any assessment of benefits of the proceedings under the act of the action of the commissioners shall file his complaint thereof in the chancery court within ten days after hearing by the commissioners herein provided for, which was on the 7th day of July, 1919.

That the plaintiff had no knowledge or information of said hearing, constructive of which only was given her and that only for the period of sixteen days for her to file her complaint, and did not have the opportunity of availing herself of said remedy by a suit in chancery within ten days after July the 7th.

The plaintiff alleges that she was entitled to due and timely notice before the assessment became a lien against her property of a hearing as to the justice and equity of the same and that she was not

given such hearing by said constructive notice by the publications aforesaid, the utmost time for which would have been seventeen [fol. 12] days and that such purported notice for such short period of time was manifestly insufficient; and that the provisions of the statute authorizing it and as thus carried out by the commissioners and such purported notice amounts to a denial of justice.

The plaintiff alleges that the assessment of benefits against her land constituting a lien thereon on August 7, 1919, by virtue of her failure to object to said assessment on said date was the deprivation of her property, contrary to the law of the land as it guaranteed her by section 21, of Article 2 of the Constitution of 1874, and deprives her of her property without process of law as is guaranteed to her — section 8 of Article 2 of the Constitution of 1874.

The plaintiff further alleges that the filing of said assessment against her lands as set forth in "Exhibit A" and the same becoming final and a lien upon her property on July 7, 1919, on account of her failure to file in writing her objections thereto on or before July 6, 1919, as provided in said act and notice, and that the only notice of such proceedings authorizing said lien to be created was the publication of the notice hereinbefore set out, to wit: the publication of said notice in the "Conway County Unit" on June 18th and June 25th, and in the "Conway County Democrat" on June 19th, and that such notice was not such notice as is required to constitute due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

And the plaintiff alleges that the act of the defendant district acting under and in pursuance to the statute of the General Assembly [fol. 13] of Arkansas referred to, to wit: Act #245 of 1919, amounted to the State through such agencies depriving the plaintiff of her property without due process of law and such proceeding is void as in conflict with the said 14th Amendment to the Constitution of the United States and the plaintiff sets out and relies upon the same as her cause of action in praying the court to declare void the assessment against her property made final by said act and such proceedings on said 7th day of July, 1919.

Plaintiff further alleges that having no notice in fact of said proceeding of July 7, 1919, she had not opportunity to take an appeal within ten days thereafter as provided in section 21 of said act, that she might have taken had she known of said proceedings, and alleges that during said ten days she was residing at her home in the City of Washington, in the District of Columbia, and had no knowledge or information of any of said proceedings until long thereafter.

Further complaining the plaintiff alleges that she was entitled to a reasonable notice constructively, if not actually, before a lien could legally be created against her land for said assessments, and that creating said lien on July 7, 1919, as hereinbefore set out was of itself a deprivation of her property rights without due process, contrary to the provisions of the State Constitution and of the 14th Amendment to the Constitution of the United States, and further alleges that if said ten days' period therein provided for bringing suit in the chancery court could be tacked to and counted in the time

given her by law for contesting the assessments that the same would be unreasonable short, amounting to in all only 26 days of construc-
[fol. 14] tive notice before her property was taken, but the plaintiff alleges that said ten days cannot be added to and tacked on to the sixteen days' notice she was given constructively of said hearing because said notice did not give any information that such lengthened time would be given, on the contrary said notice stated that "any complaint of any of said assessments of benefits or damages, must be filed with the Secretary of said Commissioners in writing before the date of said hearing" thereby affording only notice of that which it gave, which was at this hearing on July 7th and said notice did — give any information of the creation of said district by special act of the General Assembly.

The plaintiff alleges further that the notice prescribed in section 20 of said act 245 is sufficient on its face to constitute notice to the plaintiff and other landowners of the assessment made against their property. That said notice does not give the names of the owners of the land, nor a description of the land, nor any reference to any act of the Legislature, proceedings of court, or any other source of information by which those reading and receiving the notice would be notified that their land was within the district assessed.

That the notice given of the filing of the plans of the road improvement required by section 18 does not impart information of the land affected by the said plans and gives no reference to any act, map, or order of court by which the lands to be affected by the purported improvement could be identified.

That the act itself did not name any date for hearings, leaving said hearings as to plans and as to contesting assessments to be given [fol. 15] by the clerk of the county court and prescribed a form which was sufficient to give the necessary information so that said notice, even if duly published for sufficient length of time to constitute due process of law.

That the only source of information to *existing* said act was from an examination of acts passed by the General Assembly in the office of the Secretary of State. That the said acts were not printed and distributed and given circulation until long after the things and matters herein complained of occurred.

That said act itself being passed contrary to the Constitution-provision that notice should be given of its introduction, should of itself constitute no*t* notice.

Plaintiff alleges that the notices given by the commissioners of the defendant district were in conformity to said act to be *disolved* and which as alleged is insufficient to constitute such notice as is required by due process of law before a lien can legally be created against the plaintiff's property.

The plaintiff alleges that said notice was insufficient to meet the requirements of the State Constitution as due process of law and proceedings conformable to the law of the land and is insufficient to meet the requirement of the 14th Amendment to the Constitution of the United States forbidding any State or any agency of the State to take property without due process of law. The plaintiff alleges that

as a non-resident of Arkansas and a resident of the District of Columbia, she was not chargeable with notice of the special act passed by the Legislature contrary to the constitutional provisions of previous notice of its introduction, and her ignorance of said law was [fol. 16] a mistake of fact of which equity should give relief.

The plaintiff states that the notice for the hearing of complaints against the assessment called for a meeting of the commissioners on the 7th day of July, at the First National Bank of Morrilton, and she is not informed as to whether said meeting was held or not, and alleges on information and belief that it was not, and asks that the defendant be required to make proof on this subject.

Plaintiff alleges that the aforesaid assessment of benefits against her property was excessive, unreasonable and discriminatory for which she is entitled to relief in equity for the following reasons, to wit:

That the commissioners of the defendant district in assessing the benefits took as a basis therefor the valuations on the tax books of 1917, assuming that all property was assessed in the tax books equally, because they had been equalized by the Equalization Board as a basis for the assessments of benefits and divided the land into three zones—zone 1 containing all land within one mile of the road; zone 2 all land over one mile and within two miles of the road, and zone three all other lands in the district.

They allege that they assessed zone 1 at 50% of the assessed valuation; zone 2 at 40% and zone 3 at 30%, and that they made allowance for property found in two or more road districts and also property especially benefited.

That prior to 1917 the plaintiff's land had been valuable for cypress [fol. 17] timber growing thereupon and about the year 1906 she sold the cypress timber for the sum of $35,000.00 and gave the purchaser ten years to cut the same and that said timber was all cut from her lands by the year 1915, and its value decreased by the extent of the sale of her cypress timber thereon.

And notwithstanding this fact the assessment of 1917 carried her lands at the higher valuation originally induced on account of the valuable timber thereupon.

That in 1918 on a showing to the answer and township Board of Equalization her valuation was reduced to $30,320.00 which reduction was entered of record on June 12, 1919. Notwithstanding which fact the commissioners in assessing benefits in the defendant road district assessed her lands upon the value of 1917, after the same had been reduced as aforesaid by the sum of $13,000. That by using the higher valuation of 1917, notwithstanding its reduction, in making of the assessment of benefits the plaintiff was assessed on a basis of 30% higher than other property in the district similarly situated. That the assessments of the defendant district calls for 3,217 acres, whereas 300 acres of said land has been washed away by the Arkansas River and is non-existent as land. Her property consists of about 700 acres in cultivation which is good bottom land

for which she is willing to be taxed as high as any other lands in that vicinity.

In addition thereto she owns between 200 and 300 acres that could at some considerable expense be placed in a state of cultivation; that about 250 acres of her land consist of rocky ridge, unfit for cultivation, or any other purposes and is of practically no value. That [fol. 18] about 1,743 acres of her land consist of bayous, lakes and cypress brakes and is unfit for cultivation has no valuable timber upon it and is waste land and could only be reclaimed by excessive expenditures for drainage and levee purposes, that there are not houses or other improvements upon the land of any considerable value. That $1,000.00 would be an excessive valuation for all the improvements thereupon.

That notwithstanding these facts the valuation which the commissioners used to assess benefits failed to take into consideration the character of this land and the fact that the timber which had once given it value had been removed therefrom.

That the assessments against her land are grossly discriminatory. That in many instances much better land than here lying within a levee district and protected from overflows by the levee are assessed for much less than her land of less value is assessed.

That other lands immediately adjacent to hers and of like character and value are assessed much lower than her land;

That there is no equality in the assessments of benefits in said district and her lands are discriminated against in having higher assessments placed thereupon than lands of similar value therein are assessed.

The plaintiff alleges that she is prepared to show upon final hearing a gross and inequitable discrimination made against her. The first information plaintiff had of the passage of said special act 245 and the assessments of benefits against her land was in January, 1920, when she wrote to ascertain the amount of her taxes due for the year 1919. That in order to avoid the penalties which would be [fol. 19] incurred against her lands she paid to the defendant district the sum of $1,516.10 under protest.

That the amount which she then paid should be sufficient to pay all just assessments for three years and she in equity and good conscience should owe the defendant road district no taxes for the years 1920 and 1921, upon a just and equitable assessment.

The plaintiff alleges that she has frequently since learning of the arbitrary and excessive assessments against her property appealed to the commissioners of the defendant district for relief; that they have denied the same unto her, and notwithstanding these facts the defendant district is attempting to collect against her for the assessments of 1920 the sum of $1,516.15, and the defendant R. E. Bartlett, as sheriff of said county, has a warrant for the collection of said tax against her land and under the provisions of said act, unless the same is paid within a short time (an extension having been granted on all the tracts for a short period by the defendant district) it will be levied upon.

Under the provisions of said act 245 unless the same is paid within

said short extended time there will be a penalty of 25% added to the aforesaid amount and the sheriff is required under penalty to proceed to collect said assessments and penalties. That the plaintiff is willing and ready to pay all just and equitable assessments made against her property based upon the benefits received by it for the construction of the improvement in said act 245. That the plaintiff is advised that she has a good action in equity for relief against [fol. 20] the said assessment and alleges that the imposition of said penalty is inequitable and prays that she be permitted to prosecute in good faith her suit for relief without imposition of said penalty, and prays that for the protection of the sheriff that he be enjoined from collecting the tax of 1920, and adding the penalty thereupon and she offers to give good and sufficient surety that she will pay to the defendant district such assessments as the court may find equitable to be due, if any, for the year 1920, and prays that she be given credit for the excessive amounts which she paid in the year 1920, for the assessments of 1919, which were paid under compulsion and duress and over her protest.

The plaintiff further prays that the order of the county court approving the plans on June 14th be declared null and void because said plans did not contain an estimate of the aggregate costs of the improvements and that all subsequent proceedings thereunder be declared null and void and that she be given her day in court to be heard upon the merits of the assessments of benefits against her property, and that said district be restrained from selling any other bonds until the defendant district properly present plans and specifications with the aggregate costs to the county court with full opportunity of the property owners to be heard has been approved by that court. The plaintiff further prays that the court fix and determine a just and equitable assessment against her property for the years 1919 and 1920 and for all other and further relief which the court in good conscience may find her entitled to receive.

Hill & Fitzhugh, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 21] STATE OF ARKANSAS,
County of Sebastian, ss:

I, Mrs. M. L. House, do upon oath state that I am the plaintiff in the above and foregoing complaint and the allegations therein are true.

Mrs. Mary L. House.

Subscribed and sworn to before me this 24th day of May, 1921. Mabel Rilley, Notary Public. (Seal.) My commission expires Feb. 15th, 1925.

[fol. 22] "EXHIBIT A" TO COMPLAINT

Road Improvement District Number 2

Land	Miles from road	Assessment of value	Assessment of benefits
N. E. S. W. 21-6-15.....	½	$240	80
S. ½ N. W. 21-6-15.....	½	720	240
N. ½ S. E. 21-6-15.....	½	1,440	480
S. W. 22-6-15.....	½	1,920	640
S. E. 22-6-15.....	½	1,920	640
S. W. 23-6-15.....	½	4,800	1,600
S. E. 23-6-15.....	½	3,840	1,280
N. W. S. W. 24-6-15....	On road.	300	150
S. ½ S. W. 24-6-15.....	On road.	600	300
W. ½ 25-6-15.....	¼ to mile.	2,400	1,200
All 26-6-15.....	1 to 2 miles.	9,600	4,800
N. E. 27-6-15.....	1 mile.	960	490
N. E. N. W. 27-6-15....	1 mile.	960	480
N. E. Fr. of S. W. 27-6-15	1½ mile.	240	120
Frl. S. E. 27-6-15.....	1¼ mile.	3,600	1,800
N. ½ N. E. 34-6-15.....	2 miles.	1,570	785
Frl. 35-6-15.....	2 miles.	6,000	3,000
W. Frl. ½ 36-6-15.....	½ to 1 mile.	1,920	960

Total Acres, 3,217; Assessed val., $43,030; Assessed benefits, $19,035.

[fol. 23] IN THE CONWAY CHANCERY COURT

[Title omitted]

AMENDMENT TO CONFORM TO THE PROOF

Comes the plaintiff, Mrs. M. L. House, nad prays leave of the court to file this additional amendment to the complaint, alleging matters herein conformable to the proof adduced, as follows, to wit:

1. Road Improvement District No. 2 filed no estimate of costs with the County Clerk as required by section 16 of act 245.

2. The county court of Conway County did not approve any estimate of costs of Road District No. 2 and only approved the plans and specifications which did not set out an estimate of costs as required by section 16.

3. That the Commissioners of Road Improvement District No. 2 did not file with the county clerk a certified copy of the levying order which is required by section 25 of said act to be inscribed by the county clerk in a record kept in his office.

The plaintiff alleges that each of the aforesaid matters are juris-

dictional and the validity of the assessments dependent upon the compliance of the commissioners of each and the failure to comply with the same rendered the assessment herein void.

4. That the assessment herein was made under a mistake of facts, the commissioners believing that the assessment of benefits which they levied was on the basis of the county assessment then existing, [fol. 24] whereas, before said assessments became a lien the county assessment had been materially reduced, thereby reflecting an error in the assessment unknown to the commissioners and which they would have corrected, had they known it.

5. The Road District has materially changed its plans and materially increased the cost of the road without authority of law, thereby rendering the assessment invalid.

Wherefore, the plaintiff prays in addition to the prayer in the original complaint that the assessment of benefits complained of be enjoined and the plaintiff have judgment against the district for the amount of taxes which she has heretofore paid under protest and for all other equitable relief.

Hill & Fitzhugh, Attorneys for Plaintiff.

[fol. 25] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS

[Title omitted]

ADDITIONAL AMENDMENT TO CONFORM TO THE PROOF

Comes Mrs. M. L. House, the plaintiff herein, and in addition to the allegations in the complaint wherein the assessment of benefits is alleged to be discriminatory, excessive, and lacking in uniformity with other property similar in value and location with the plaintiff's property, further alleges:

That the Board of Commissioners accepted as a true basis of value the 1917 county assessments, without investigation of its equality and uniformity, and fixed the amount of benefits against plaintiff's land and all other lands in the said district based on a given percentage of said county assessment. That the method adopted by the board of commissioners necessarily reflected in the assessment of benefits any errors and discrimination in the 1917 assessments. That the 1917 county assessment was grossly excessive so far as the plaintiff's land was concerned, and was reduced $15,000.00 or thirty-three and one third per cent before the assessments of benefits in the defendant district had been finally approved by the commissioners, and the commissioners were ignorant of that fact.

That the reduced assessment of 1919 was excessive compared with similar land and situation. That the 1917 assessments used as a [fol. 26] basis for the assessments by the defendant District's Com-

missioners was grossly discriminatory and excessive and amounted to confiscation in the following particulars, to wit:

The plaintiff has 725 acres of land covered constantly by water, consisting of large lakes, bayous, sloughs and creeks. That said land was of no commercial value and was assessed from $4.50 to $12.50 per acre, and assessments of benefits levied on it on a percentage basis of said values. That from the very nature of said land no possible enhancement in value could be attributed to it by the improvement of the road in defendant district. That the said commissioners were ignorant of the character of said land or else wilfully perpetrated a fraud on plaintiff.

That the assessment aforesaid against said land amounts to confiscation and should be declared void on said account.

That 1,030 acres of plaintiff's land consists of low, wet and overflowed land not in cultivation and from which the merchantable timber had been taken, and is not susceptible of cultivation except through a system of drainage and levees prohibitive in cost.

That said land was assessed at from $5.00 to $20.00 per acre. That its utmost market value would be from $3.00 to $5.00 per acre and on a fifty per cent basis the highest assessments should be $2.50 per acre, and it is assessed from twice to eight times said amount.

That the defendant's commissioners were ignorant of the character of said land or else perpetrated a fraud on the plaintiff.

That the assessed — levied upon said land amounts to confiscation and should be declared void on such account.

[fol. 27] That the plaintiff has about 300 acres of hill land of small value which is excessively assessed and not uniform with similar lands, and that said commissioners were ignorant of its character and location.

That the plaintiff's property in the district of real value is about 700 acres of bottom land, a part of which is above overflow but most of it subject to overflow, and none of it is protected by levees. That over half of it is assessed at $30.00 per acre and the remainder at $22.50 to $25.00 per acre. That $30.00 per acre is the highest amount assessed against my land in the county. That other land in the county assessed at $30.00 per acre is worth double the amount of plaintiff's land; and land in the immediate vicinity to plaintiff's land, and more accessible to the road of the defendant district is assessed at $30.00 and is worth double plaintiff's land; and hundreds of acres of land immediately adjacent to plaintiff's land and more accessible to the road in defendant district, and of as great or greater value than plaintiff's best land, is assessed at from $5.00 to $15.00 per acre. That no land in the vicinity is assessed uniformly with plaintiffs.

That these facts were unknown to the Commissioners when they assessed the benefits or else they wilfully perpetrated a fraud on plaintiff.

That the plaintiff is willing to assume that the said Commissioners have not wilfully perpetrated a fraud on her, taken advantage of her nonresidence in order to lighten the burden of resident tax payers, and alleges that the defendant pursued the method of levying benefits

on the 1917 county assessment erroneously and thereby a fundamental error was committed in her assessment of benefits without their knowledge. That said assessment amounts to a discrimination [fol. 28] against and a confiscation of her property and is so gross that it amounts to demonstrable mistake and operate as a fund. That the said commissioners, instead of exercising their own judgment of value, accepted said excessive and discriminatory assessment, in violation of their duty to plaintiff.

That plaintiff was without the state during all the times herein complained of and had no knowledge until long afterwards of the gross error or fraud on her rights, and promptly sought relief when she learned of the same from the Board and failing in the same thereafter brought this suit.

That the said commissioners should be stopped in equity and good conscience from setting up the limitation in act No. 245 even if it is applicable, which the plaintiff denies for these reasons:

That said commissioners' demonstrable mistake or fraud was unintentionally made and not know either to themselves or the plaintiff until after said period had run and to allow them now to avail themselves of it would be the assumption of rights based on fraud or mistake which is contrary to the principles of equity.

Wherefore plaintiff prays for the relief heretofore prayed in her complaint in equity, the amendment thereto, as well as the causes herein set forth.

—— ——, Attorneys for Plaintiff.

[fol. 29] IN THE CONWAY CHANCERY COURT

[Title omitted]

ANSWER

On this day come the defendants, Road Improvement District #2 of Conway County and R. E. Bartlett, Sheriff of Conway County, and in answer to the complaint heretofore filed state:

That the plaintiff is, and has been for the past thirty years a resident of Conway County, Arkansas, that she is not a resident of the City of Washington, as is set forth in the complaint.

Defendants deny that the plaintiff does not own the amount of acreage for which she was assessed, but state that the accretion to her land amounts to more than that part which has been carried away by the Arkansas River. Defendants further state that the lands of the plaintiff are assessed at about 25¢ on the dollar, and the total assessments — benefits is less than one-sixth of the actual value of the plaintiff's land, consider*ation* the market at its present state.

Defendants state that the special act creating the road district was passed in conformity with the Constitution of the State of Arkansas, and deny that it contravenes sections 25 and 26 of article 5 of the

Supreme Court of the United States.
Washington, D. C.

Insufficient letter 2 Oct
p. 6. "Denial of justice"
See p. 11

P.C.
1921, 14th
#92
R. p. 34.

Supreme Court of the United States.

Memorandum.

----------, 19

#92

May this case be dismissed per curiam upon the authority of Campbell v Olney 262 US.

Moffat-Trumbull case - Rehearing denied

Constitution of 1874; deny that the plaintiff did not have full knowledge of the passage of the law creating the district and all proceedings thereunder.

Defendants deny that the notice of the filings of the plans was not given, as provided by the statute, but stated that the same were filed in open court on the 17th day of May, 1919, and certificate of the [fol. 30] clerk taken to that effect; that the said estimate shows the total amount of the cost of improvement. Defendants further state that all provision of the law pertaining to the filing of the plans, the hearing thereon and filing of said assessment and hearing thereon were complied with, in accordance with said act. They further state that on the 17th day of May was filed together with the estimates, as required by the statute, and proof of publication was filed showing the publication of the notice, as required by the statute, was had on the 22nd and 29th days of May; the hearing was set for June which day the plans were approved by the county court. Thereupon the assessments of benefits was made and filed and proof of publication was filed showing that the notice had been published in the Conway County Unit, on the 18th day of June; and the hearing was set for the 7th day of July. Defendants deny that the plaintiff had no notice of such proceedings, and of such newspaper report and notices, and allege on information and belief that she had actual notice of said proceedings, and further allege that she had constructive notice as required by law. Defendants deny that the time provided for in the statute creating the district was insufficient for plaintiff to have availed herself of the provisions of said statute and deny that the statute and the proceedings of the commissioners contravene at section 21 of the Article 2 of the Constitution of '74, and Section 8 of the Section 2 of the Constitution of '74; and deny that the publication of the notices, as provided in the statute, violate the 14th Amendment to the Constitution of the United States.

Defendants deny that the plaintiff did not have actual notice of the proceedings of the commissioners and the enactment of the law, [fol. 31] and deny that the constructive notice given her contravenes the 14th Amendment to the Constitution of the United States, and deny that the notice given is not in conformity with the statute creating the district. And defendants state that the plaintiff had the same notice that all other property owners within the district had. Defendants deny that the notice of the filing of the plans and assessments of benefits is not sufficient, as required by the laws and the Constitution of the State of Arkansas and the United States, but state that the same is sufficient and is the same in all cases and for all property owners within the boundaries of the district and that the plaintiff is chargeable with notice, the same as all other property owners within the district.

Defendants deny that the assessments against the plaintiff's property is unreasonable, excessive or discriminatory, but state that the plaintiff's property is assessed the same as all other property of similar kind and location in the district, that no discrimination whatever was made against the plaintiff's land.

Defendants deny that plaintiff's property assessments has been

reduced from 1919-1918 to the extent of $5,000.00; but state that if the same has been reduced and the plaintiff is entitled to any adjustment in the assessments of benefits on account of mis-tax or changes in conditions, the law creating the district gives ample power for such corrections.

Defendants deny that the plaintiff has lost 300 acres in the Arkansas River, but state that she has gained by accretion more than she has lost. Defendants further state that the greater portion of plaintiff's land is fit for cultivation and is fine river bottom land. [fol. 32] Defendants deny that the valuable timber has been removed from the plaintiff's land and deny that there is any discrimination whatever against the plaintiff's land as compared with other lands in the district.

Defendants state that the plaintiff knew of the assessment against her land on January, 1920, and that she paid the taxes for the year; that during that year the road was constructed and a large amount of the money expended, which money was derived from the proceeds of the sale of bonds; and that the plaintiff by delaying the institution of this suit for over one year after her first installment of taxes became due has prevented defendants from any opportunity to be heard on the matter, at a time when they should have had an opportunity to do so, to the great detriment of the district and other property owners therein; and defendants pray laches to plaintiff's complaint.

Defendants further state that the board of commissioners has at the request of the plaintiff held frequent meetings, at which meetings she was invited to be present, and several instances the meeting- were called at her request; but the plaintiff has failed and refused to attend said meetings, or in any manner undertake to point out any irregularities or mistakes that were made by the commissioners, if any, which might be adjusted.

Defendants further state that they have proceeded in accordance with the provisions of the act creating the district and the commissioners have done and complied with said act in every detail and respect; that no complaints or protests were filed as provided for in said act, and after the time had expired for filing any protest, the commissioners issued bonds of the district, which bonds contain a provision to the effect that all laws and Constitution of the State [fol. 33] of Arkansas have been complied with, which said bonds have been sold to various and sundry persons throughout the United States relying on the covenants contained in said bond; that on account of the plaintiff not having made any complaint prior to the said suit said plaintiff is stopped from claiming any relief.

Defendants further state that they have been at all times ready and willing to adjust any inequality in the assessments of benefits or correct any error, that they have so notified the plaintiff through her attorneys on several occasions; but the defendants believe that the plaintiff has been assessed in a fair and equitable manner, and, if there has been any mistake made in her assessment, the same has not been brought to the attention of the defendants.

Wherefore, the defendants pray that this suit be dismissed, and for costs in and about this suit expended, and such other and further relief as they may be entitled to.

Owens & Ehrman, Attorneys for Defendants.

[fol. 34] IN THE CONWAY CHANCERY COURT

[Title omitted]

ANSWER TO AMENDMENT TO COMPLAINT

Comes Road Improvement District Nmber 2, Conway County Arkansas, the defendant herein and in answer to the amendment to complaint says:

Defendant denies that Road Improvement District Number Two filed no estimate of cost with the county clerk, as required by section 16 of act 245, but says that said estimate of costs was filed in the manner and form as required by law.

Defendant denies that the county court of Conway County did not approve any estimate of cost of Road District Number Two but only approved the plans and specifications which did not set out the estimate of cost as set out in section 16, but says that the order of approval as entered by the court was in strict accordance with the provisions of said act.

Defendant denies that the commissioners of Road Improvement District Number 2, did not file with the county clerk a certified copy of the levying order which is required by section 25 of said act to be inscribed by the county clerk and a record kept in his office.

Defendant denies that each of the aforesaid matters are jurisdictional and the validity of the assessments dependent upon the compliance of the commissioners of each and the failure to comply with the same rendered the assessments herein void.

[fol. 35] Defendant denies that the assessment herein was made under a mistake of facts, the commissioners believing that the assessments of benefits which they levied was on the basis of the county assessments then existing whereas before said assessment became a lien the county assessment had been materially reduced thereby reflecting an error in the assessment unknown to the commissioners and which they would have corrected had they known it. Defendant says that if an error or mistake has been made by the commissioners that the act under which said district was created and organized contains adequate provisions for the correction of such errors and mistakes upon application being made in an appropriate manner.

Defendant denies that said district has materially changed its plans and materially increased the cost of the road without authority of law, thereby rendering the assessment invalid.

Wherefore defendant having fully answered prays that the complaint herein be dismissed and that it have its costs herein expended.

Owens & Ehrman, Attorneys for Defendant.

[fol. 36] IN THE CONWAY CHANCERY COURT

[Title omitted]

DEMURRER OF DEFENDANT ROAD IMPROVEMENT DISTRICT NUMBER 2

Comes the defendant, Road Improvement District Number Two, Conway County, and files its demurrer to certain paragraphs of said complaint.

First. Defendant demurs to every word, line and paragraph in said complaint, and amendments thereto, which attacks the validity of Act 245 of the General Assembly of 1919, which is the act under which Road Improvement District Number 2, Conway County, was organized and says that said allegations are insufficient to constitute a cause of action against this defendant.

Second. Defendant demurs to every word, line and paragraph in said complaint, and amendment thereto, which alleges that the notices to the property owners of the filing of said plans and specifications and of the filing of said assessment of benefits is insufficient and in conflict with the constitution of the State of Arkansas, and of the 14th Amendment to the Constitution of the United States, and says that same is insufficient to constitute a cause of action against this defendant.

Third. Defendant demurs to every word, line and paragraph in said complaint, and the amendments thereto, which alleges that the assessments of benefits as finally fixed by the said defendant was erroneously fixed and contrary to the constitution of the State of Arkansas and to the 14th Amendment to the Constitution of the United [fol. 37] States, and says that same is insufficient to constitute a cause of action against this defendant.

Fourth. Defendant demurs to every word, line and paragraph in said complaint and every allegation thereto including the amendments to said complaint, in which it is alleged that the court has authority to reopen the assessment of benefits and readjust same at this time and says that said — is insufficient to constitute a cause of action against this defendant.

Wherefore defendant prays that its demurrer be sustained.

Owens & Ehrman, Attorneys for Defendant.

[fols. 38-46] ACT 245

An Act to Create Road Improvements Number- Two, Three, Four, and Five of Conway County

* * * * * * *

[fol. 47] Section 18. Immediately on the filing of said plans with the county clerk, the clerk shall give notice by publication once a

[fol. 48] week for two weeks in some newspaper published in the county, designating a date when the county court will be in session, for the submission of said plans to it, the last insertion of said notice to be not less than five days before the date of the consideration of said plans by the county court. Said notice may be in the following form:

"Notice is hereby given that the plans for the improvement in Road Improvement District No. — have been filed in my office and are now open to inspection, and that said plans will be submitted to the county court for its approval or modification on the — day of ——, 19—. All parties interested are hereby notified that they will be heard in regard to said plans on the date named, or on any date to which the county court may continue the hearing."

Section 19. On the date named in said notice, the county court shall consider said plans and shall hear any landowner interested therein, who may desire to be heard; and said hearing may be continued from time to time until completed. The county court may approve said plans as submitted by the commissioners, or as modified by the county court, and when so approved by the county court, said plans shall be the plans for the district. If said plans contemplate that the line of any public road to be improved shall be straightened or changed, and the county court approves the same, this shall constitute a laying out by the county court of the said road as changed. If any change shall be made in the route of the public road as it now exists, so that it is necessary to take any additional lands for said roads, the commissioners shall notify the owner of such land of such change by personal notice, which shall be deemed served upon him if [fol. 49] served in person on said owner or upon any occupant of the lands; or in the event there is no occupant of the land so taken, then by publication in some newspaper published in the county, once a week for two weeks, the said personal notice naming a date not less than fifteen (15) days after the last insertion thereof, in which the owner of said lands, if he claims his lands are damaged by the laying out and constructing of the new road caused by the change in route, may file his claim in writing with the county court, within a period of not more than fifteen (15) days after personal notice of such change has been served upon him, or fifteen days after the last insertion of said publication; and the county court shall proceed to consider said claim and allow any amount of damages that it considers the claimant is entitled to, which shall be paid by the county. If the claimant feels agrieved by the allowance of the county court, he shall have the right to appeal to the circuit court from said allowance within thirty (30) days; but not thereafter. If anyone shall not file a claim for damages with the county court within the time herein mentioned, he shall be deemed to have waived the same.

Section 20. Immediately after the approval of said plans by the county court, the commissioners shall proceed to make an assessment of benefits to be received by each tract or parcel of land, railroads and tramroads, and all other real property within the district, and

shall inscribe the same in a book, in which all of the lands shall be shown, and shall show opposite each tract in said book, the assessment of benefits against each tract. The name of the supposed owner shall be shown opposite the several tracts, but a mistake in the name shall not affect the regularity or validity of the assessment. The [fol. 50] tracts and parcels of land, railroads and tramroads, shall be shown in such description or subdivision as may be convenient. If any lands in said district are or will be damaged by reason of the making of said improvement, the amount of the damages shall be assessed by the commissioners and shown in said book opposite the tract of land damaged. The assessment book containing all of the land shall remain in the custody of the commissioners, and a copy of the book showing the lands shall be filed with the county clerk. Immediately upon the filing of the said book the county clerk shall give notice by publication once a week for two weeks in some newspaper published in the county, stating the fact that the assessment of benefits and damages to the land in said district has been filed in his office, and that the assessment of benefits for the lands is in the hands of the commissioners, and designate a date to be fixed by the commissioners on which the commissioners shall hear any complaint of said assessment, the said date to be not less than ten (10) days after the last insertion of said notice. Said notice may be in the following form:

Notice of the Assessment of Benefits in Road Improvement District No. — of Conway County, Arkansas

"Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number — of Conway County has been completed and is on file with the secretary of said commissioners, and is open for inspection, and a copy of said assessment of benefits and damages is on file in my office and open to inspection and that the said commissioners for said district will on the — day of ——, ——, attend at ——, Conway County for the purpose of hearing any complaints against any of said assessments of benefits or damages. Any complaint of any of said assessment of benefits or [fol. 51] damages must be filed with the secretary of said commissioners in writing before the date of said hearing."

On the date named in said notice, the commissioners shall attend at the place named for the purpose of hearing any complaints against any of said assessments of benefits or damages, and shall hear any complaints that have been made in writing and filed with the secretary of the board before the date of said hearing, and shall hear in person any parties who may appear in support of said written complaints. Any party not complaining in writing of any of said assessment of benefits or damages in the manner and within the time herein provided, shall be deemed to have waived any objection he may have thereto. At the said hearing, the commissioners shall consider said assessment of benefits and damages, and any complaint that may be filed thereto, and if they find any assessment of benefits

or damages is inequitable or unjust they shall correct the same so that it will be equitable and just.

Section 21. Any party who may have complained in writing of any of said assessments of benefits or damages, and who feels aggrieved by the action of the commissioners after the hearing herein provided for, and any other person whomsoever who may have any objection to any assessment of benefits or damages, or to any other proceedings under this Act or action of the commissioners, shall file his complaint thereof in the chancery court having jurisdiction within ten days after the hearing by the commissioners herein provided for, and any party not complaining within that time shall be deemed to have waived any objection he may have to any of said assessments of benefits or damages, and shall not be [fols. 52-64] heard to complain in law or equity thereafter, and no suit shall thereafter be brought in any court attacking the validity of any of said assessments of benefits or damages. If the assessment of benefits or damages against any tract shall be found invalid by the court within the time limited, the commissioners shall proceed to make another assessment of that tract or parcel of real property under the direction of said court; and if the entire assessment is set aside by the court, the commissioners shall proceed to make a new assessment in the manner and after the notice as *hearing* provided for the original assessment.

* * * * * * *

[fol. 65] In Chancery Court of Conway County

[Title omitted]

Decree

On this 6th day of April 1922, this cause comes on for hearing before the Honorable W. E. Atkinson, Chancellor in Chambers, it having been agreed by counsel that the cause would be submitted in Chambers during vacation, and the plaintiff, Mrs M. L. House appearing in *h*erson and by her solicitors, Hill & Fitzhugh, Fort Smith, Arkansas, and the defendant, Road Improvement District Number Two, Conway County, appearing in person and by its solicitors, Grover T. Owens; and all parties announcing ready for trial the cause is submitted upon the demurrer heretofore filed by the defendant to certain paragraphs and allegations of said complaint and the court being well and sufficiently advised as to the issues of law herein arising doth sustain said demurrer.

To which ruling on said demurrer the plaintiff at the time excepted and saved exceptions and stood upon her complaint; the plaintiff offered to the consideration of the court the evidence on file taken by the plaintiff to sustain the allegations of her complaint and its amendments as well as the evidence taken by the defendants

to sustain their answer, which evidence in part was taken in conjunction with evidence taken in a similar case against No. 5 District and where joint — was applicable so far as it related to each District.

The court excluded all evidence except on the issues hereafter stated, to which ruling the plaintiff at the time excepted.

[fol. 66] There being other allegations in said complaint — which no demurrer was filed, same is submitted upon the complaint, the amendments thereto, and the answer of the defendants together with certain depositions heretofore taken and filed upon the part of the plaintiff, and certain depositions heretofore taken and filed upon the part of the defendant, and the oral testimony, taken in open court, of Mrs. M. L. House and Sam Mitchell, who testified upon the part of the plaintiff; and the oral testimony of J. L. Williams, E. E. Mitchell and Cleo Cheek, taken in open court who testified in behalf of defendant; it being agreed that said testimony should be reduced to writing and become depositions in this cause; and the court being well and sufficiently advised as to the issues of law, and facts herein arising, doth find:

First. That the preliminary estimate as to the cost of the improvement was duly filed with the county clerk by the commissioners at the time the plans were filed on May 17, 1919 and that said defendant in the filing thereof fully complied with the law.

Second. That the defendant has not materially changed the plans of the improvement which it is constructing, but that same is being constructed in accordance with the law under which it is operating.

Third. That the levy of the annual tax, as required by the act, has been duly made by the defendant, as provided by law.

It is therefore ordered, adjudged and decreed that the complaint be and the same is hereby dismissed at the cost of the plaintiff.

To all of which findings and rulings the plaintiff Mrs. M. L. House, prayed and is hereby granted an appeal to the Supreme [fol. 67] Court; and it is further ordered that upon the execution and filing with the clerk of this court a bond to be approved by him within thirty days from this date, conditioned as provided by law for appeal to the Supreme Court, and further conditioned as provided by law for payments of all damages which defendants may sustain by reason of the injunction, then that pending a final hearing of this cause on appeal, execution upon said judgment for taxes as above set out, be and the same is hereby stayed and in addition thereto the collection of all taxes, penalties and cost for the year 1921, due in 1922, upon the lands of this plaintiff to the said District be and the same is hereby enjoined and restrained until the further order of this court, the Supreme Court, or any other court, having jurisdiction herein or thereof.

The court further finds that the litigations herein present a fairly justiciable controversy and the plaintiff in good faith in prosecuting her alleged rights and is entitled to relief in equity against the penalty for nonpayment of the assessments herein enjoined and the

defendants are perpetually enjoined from collecting penalties for the non-payment of the controverted assessments of 1920 and 1921, due respectively April 10, 1921, and April 10, 1922, to which finding the defendant excepted.

This cause having been heard by the Chancellor by consent of all parties in vacation, it was agreed by the parties thereto that the decree should be entered in vacation and have the same force and effect as if made and entered of record in term time as provided in section 2190 of Crawford & Moses' Digest.

In witness whereof I have hereunto set my hand as Judge of the Ninth Chancery District, this the 8th day of May, 1922.

W. E. Atkinson, Chancellor.

[fol. 68] Be it remembered, That at a term of the Supreme Court of the State of Arkansas begun and held at the Court House in the City of Little Rock, on the 22nd day, being the fourth Monday of May, A. D. 1922, the following proceedings were had, viz:

October 9, 1922

[Title omitted]

Minute Entries

By leave of court the parties file a stipulation pursuant to Rule 24, amending the record herein, so as to speak the truth.

October 30, 1922

(Caption omitted)

On motion, the appellees are allowed by the Court two weeks additional time in which to file their brief herein.

* * * * * * *

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House in the City of Little Rock, on the 27th day, being the fourth Monday of November, A. D. 1922, the following proceedings were had, viz:

January 8, 1923

By leave of Court the parties hereto file a stipulation pursuant to rule 24, amending the record herein so as to speak the truth.

March 19, 1923.

[fol. 69] IN SUPREME COURT OF ARKANSAS

ORDER SETTING CAUSE FOR HEARING

The following causes, heretofore noted for oral argument, are now by the Court set down for such arguments on April 2nd, prox, viz:

April 2, 1923

[Title omitted]

ARGUMENT AND SUBMISSION

The following causes being regularly called come the parties thereto by their attorneys and solicitors, and said causes are submitted upon the transcripts of the records and the briefs filed, and are by the Court severally taken under advisement, viz:

* * * * * * *

7604

Mrs. M. L. HOUSE

v.

ROAD IMPROVEMENT DISTRICT NO. 2 OF CONWAY COUNTY et al.

Argued orally.

IN SUPREME COURT OF ARKANSAS

April 16, 1923

(Caption omitted)

DECREE

This cause came on to be heard upon the transcript of the record of the chancery court of Conway County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellant and Fidelity & Deposit Company of Maryland, surety in the supersedeas bond filed in this cause, all their costs in this Court and the Court below in this cause expended, and have execution thereof. Wood and Hart, JJ., dissent.

[fol. 70] IN SUPREME COURT OF ARKANSAS

April 30, 1923

ORDERS ENLARGING TIME

The appellant having filed a petition for rehearing within the time allowed by law, now prays for time in which to file a supporting brief; and said appellant is allowed by the Court one week from date in which to file such brief.

May 7, 1923

On motion, the appellees are allowed by the Court one week in which to file a brief in response to the appellant's brief in support of her petition for rehearing.

IN SUPREME COURT OF ARKANSAS

May 14, 1923

ORDER OVERRULING PETITION FOR REHEARING

Petitions for rehearing filed in the following causes being called, they are now submitted, and by the Court severally taken under advisement, viz:

May 21, 1923

[Title omitted]

Being fully advised, the petition for rehearing filed herein is by the Court overruled; and the opinion heretofore handed down, is by the Court amended.

[fol. 71] IN THE SUPREME COURT OF ARKANSAS

No. 7604

[Title omitted]

MOTION FOR REHEARING—Filed Apr. 28, 1923

Comes the appellant and moves the Court for a rehearing and alleges that without acquiescing in other points the appellant alleges two outstanding errors in the opinion as follows:

First. The Court said that Section 20 of the creating act prescribed the form of notice and required the Commissioners to attend at the time and place specified in the motion for the purpose of hearing any complaints, and that any person failing to appear or complain within the time limit should be deemed to have waived all objections to his assessment.

Next the Court holds that under Section 21 of the act that the right to apply to the chancery court for relief was not limited to the property owners who had appeared and protested against their assessments and referred to Foster v. Bayou Meto Drainage Dist., 132 Ark. 141, to sustain such holding.

Next the Court holds that under Section 21 of the act the property owner has an additional ten days to question his assessment and that under any circumstances he has under said act twenty-eight (28) days to appear and oppose his assessment.

Further the Court holds (and correctly) that in passing "upon the sufficiency of the notice to property owners to constitute due [fol. 72] process of law we test the act by the shortest time under which notice could be given pursuant to this requirement," and then stated, as we contend, erroneously, that this time is 28 days.

The appellant alleges that in addition to the error last noted, that the Court in the aforesaid rulings has erred in these particulars:

(*a*) The Court incorrectly stated the substance of Section 20.

(*b*) The Court erroneously held that the right to apply for relief to the chancery court was not limited to property owners who had appeared before the Commissioners.

(*c*) The Court erred in applying the case of Foster v. Bayou Meto Drainage Dist., supra, to this case, as the statute there construed was entirely different from this one.

(*d*) The Court erred in holding the ten days to sue in chancery court after the hearing date should be tacked to the notice of the hearing before the Commissioners.

(*e*) The Court erred in considering the time for bringing suit after the hearing in determining the sufficiency of the notice of the hearing on the assessments.

Second. The Court in stating the second contention of the appellant states that the notice was insufficient in form for the reason that it did not contain a description of the lands within the District which would be subject to the payment of the cost of the whole improvement. In this the Court erroneously stated the position of the appellant, and has not considered fully the position of the appellant in this regard, which is fully stated at pp. 38-46 of our original brief, and at page 12 of our brief in reply. In brief, our con- [fol. 73] tention was not merely that the property was not described, but the act creating the District was not mentioned, nor identified, the boundaries of the District were not named, the property owners were not named and the property itself was not posted, and there was no evidence of the identity of the District or property or owners affected disclosed on the face of the notice. For these reasons the appellant prays the Court that the case be reheard and these subjects re-considered.

Hill & Fitzhugh, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 74] IN THE SUPREME COURT OF ARKANSAS, APRIL 16, 1923

No. 313

[Title omitted]

OPINION

SMITH, J.:

Appellant—who was the plaintiff below— brought this suit to enjoin the collection of an assesment of betterments for road taxes against her lands by Road Improvement District No. 2 of Conway County. She alleged that she owned 3,217 acres lying in the district; that the ad valorem assessment against the land for general revenue purposes was $43,030.00, and that the benefits assessed for the improvement of the road were $19,035.00, which are payable in twenty annual installments of $1,516.15, amounting in all, with the interest thereon, to $30,323.00.

The road improvement district was created by act 245 passed at the regular session of the 1919 General Assembly, and, pursuant to the authority therein conferred, the commissioners named by the county court assessed the betterments which the plaintiff, by this suit, seeks to enjoin.

The organization of the district and the assessment of betterments by it are attacked on the following grounds: (1) That the notice of the assessment of betterments—which by the terms of the act, became liens on the land situated within the district—was insufficient in time to constitute due process of law; (2) that the notice to the property owners was insufficient on its face; (3) that the assessments were made under a mistake of fact, and are void on that account; (4) that the assessments are void because of discrimination against appellant in assessing the betterments against her land; (5) that there was no valid levy of the assessments the collection of which is sought to be enjoined; (6) that the assessments are void because the [fol. 75] commissioners made a material change in the plans upon which the assessments were based without revising the assessments.

Relief against plaintiff's assessments was denied upon any of the grounds of attack, and her complaint was dismissed as being without equity, and she has appealed.

We will discuss these questions in the order stated.

Act 245 of the Acts of 1919 (Special Road Acts, Vol. 1, p. 1025) contained the emergency clause and became a law on March 11, 1919. It is substantially identical with a number of other special road laws passed at that session, and its provisions here under review are practically identical with those of a number of these other acts relating to the same subject.

The act created Road Improvement Districts 2, 3, 4 and 5, and defined the boundaries of each; and section 9 thereof directed the county court to appoint three commissioners for each of these districts. These commissioners were duly appointed, and qualified and entered upon and proceeded to discharge the duties imposed upon

them. By section 11 it was made the duty of the commissioners to improve and construct the roads therein described by grading, draining and surfacing them, or parts of them, in such manner and with materials as the plans of the district may designate, and by constructing bridges and culverts as needed, according to plans that may be approved by the county court.

Section 13 provided for preliminary plans to be made by the State Highway Department, and authorized the commissioners to use these plans or to return them to the State Highway Department [fol. 76] 3) for amendment, and the Highway Department was directed to make plans and estimates upon the request of the commissioners, and to "amend any plans and estimates on more than one type or surface of the road, or its parts, containing alternative plans for bridges or culverts, together with any recommendation they may see fit to make."

Section 14 deals also with the plans to be adopted, but provides that the plans finally adopted shall be approved by the State Highway Department.

By section 16 it was provided that, after the plans had been approved, they should be filed with the clerk of the county court. The plans for District No. 2 were filed with the clerk of the county court on May 17, 1919, and were duly approved on June 14th. The order of approval recited that no one had appeared in opposition to them.

Section 17 of the act contemplated that the plans of the improvement, as approved by the county court, might prove beneficial to lands not embraced in the original district as defined by the act, and provision was made for the extension of the boundaries of the district to include such lands. This section of the act required two weeks' published notice of that proceeding, and provided that the hearing thereon should not be less than ten days after the date of the last publication of the notice, and, after the hearing by the county court there provided for, any landowner whose lands were thus included was given ten days in which to appeal from the order of the court. None of the plaintiff's lands were brought into the district in this manner; but these, as well as other provisions of the act, must be taken into account in determining the shortest time in which [fol. 77] a lien could be fixed upon the lands.

After the commissioners, with the approval of the State Highway Department, had finally worked out the proposed plans, and had filed them with the clerk of the county court, that officer was required, by section 18, to give notice of that fact by publication once a week for two weeks in some newspaper published in the county, designating the date that the county court would be in session for the submission of the plans to it, the last insertion of said notice to be not less than five days before the date of the consideration of said plans. A form of this notice is set out in section 18.

Section 19 provides that, on the date named in the notice, the county court should consider said plans, and should hear any landowner interested therein, and that the hearing should be continued from time to time until completed, and that when said plans had

been approved, or had been modified and approved, they should be the plans of the district.

The act contains no express provision for an appeal from the order and judgment of the county court approving these plans; but the right of appeal existed and could have been exercised by any landowner, and the plans would, of course, not have become final until such appeal had been disposed of. Carter v. Randolph County, 146 Ark. 221; Huddleston v. Coffman, 90 Ark. 219.

Section 20 provides that, immediately after the approval of the plans, the commissioners shall proceed to make an assessment of benefits against the real property within the district, and shall in- [fol. 78] scribe the same in a book in which all the land shall be shown, and shall show opposite each tract the benefits assessed against it. As a part of the assessments the commissioners were required to find and state any damages to any land which would result from the construction of the proposed improvement. The original of this book remained with the commissioners, but they were required to make a copy thereof and file it with the county clerk, and this they did. Immediately upon filing this copy with that officer, it became his duty to give notice by publication, once a week for two weeks, in some newspaper published in the county, stating the fact that the assessment of benefits and damages to the lands in said district had been filed in his office, and to designate the date fixed by the commissioners on which the commissioners would hear any complaint against said assessments, the date of said hearing to be not less than ten days after the last insertion of said notice.

The assessment of benefits and damages was filed by the commissioners on June 17, 1919, and the notice thereof was published in a weekly newspaper published in that county in the issues of June 18th and June 25th, and advised all persons to file their objections on or before July 7, 1919, the date named for the hearing of complaints by the commissioners. Section 20 prescribed the form of this notice, and the notice given conformed thereto, and it also required the commissioners to attend at the time and place specified in the notice for the purpose of hearing any complaints against any of said assessments of benefits or damages and that any person failing to appear or complain within the time limited should be [fol. 79] deemed to have waived any objection to his assessment of benefits or damages. The commissioners were directed at this hearing to so adjust the assessments as that, when adjusted, they should be equitable and just.

Section 21 provided that any aggrieved property owner might, within ten days after the hearing by the commissioners, file complaint in the chancery court against his assessments; and that court was directed to hear such complaint and do equity in the matter and, to that end, was authorized, if it was found proper so to do, to set aside the entire assessment and to order a new assessment in the manner and after the notice and hearing provided in the original assessment. It thus becomes obvious that the hearing provided for before the chancery court is itself a de novo hearing.

After the approval of the assessments by the Commissioners, any

property owner had ten days thereafter in which to apply to the chancery court for relief; and the right to so apply was not limited to those property owners only who had appeared and protested before the commissioners, for, after providing that persons who had complained in writing of their assessments might appeal, Section 21 also provided that "any other person whomsoever who might have any objection to any assessment of benefits or damages, or to any other proceeding under this act or action of the commissioners," might file complaint in the chancery court within ten days after the completion of the hearing by the commissioners.

This language is too broad for its meaning to be mistaken. The land owner was given an opportunity, if he desired it, to appear and complain before the commissioners about his assessments, or, if he [fol. 80] preferred, he might wait until the commissioners had passed upon the assessments and then appeal to the chancery court, and in either case he was entitled to an original de novo hearing. It was not necessary that he formally make himself a party to the proceedings. He was made a party by the act itself, unless he appeared before the commissioners and was heard by them, he waived the right to that hearing; and if, at the conclusion of the hearing by the commissioners, a hearing by the chancery court was not invoked, the assessment became final and binding. Coffman v. Road Improvement Dist. No. 6 of Lawrence County, 134 Ark. 411.

The case of Foster v. Bayou Meto Drainage District, 132 Ark. 141, involved the right of land owners to protest against their assessments for drainage purposes. The act there construed provided that any aggrieved property owner might appear before the county court within ten days after the publication of the notice of the assessment of betterments, and should have the right of appeal from the order of the county court upon his complaint within twenty days thereafter. It was there contended that only those persons could appeal from the order and judgment of the county court who had made themselves parties to the proceedings in that court. But we held that it was the purpose of the lawmakers to treat each property owner as a party to the record, so far as it affected the assessment of his property, and to give him the right of appeal at any time within twenty days after the final order of the court fixing the assessments, whether he had in fact appeared before the county court or not. Here, the property owners must also be regarded as [fol. 81] being before the commissioners, with the right to apply to the chancery court, whether they filed formal protest against their assessments or not, and this additional ten days must, therefore, be taken as a part of the time allowed by the act within which an aggrieved property owner might question his assessment in the chancery court. So that, if it be assumed that the commissioners would proceed with the greatest expedition possible in fixing liens on the lands in the district, and should discharge that duty perfunctorily or in bad faith, the property owner would have at least eighteen days in which to question his assessment before the commissioners, after the first publication of the notice that betterments had been assessed, which is itself, in our opinion, due process of

law, and he also has, in addition, ten days to proceed under section 21, giving him 28 days, under any circumstances, to appear and oppose his assessments.

Is that notice sufficient to constitute due process of law? We answer this question in the affirmative; and we do so upon the authority of the case of Ballard v. Hunter, 204 U. S. 241, and other decisions of the Supreme Court of the United States cited in the briefs of respective counsel, both prior and subsequent to that case. This case of Ballard v. Hunter originated in this State (74 Ark. 174), and went to the Supreme Court of the United States upon writ of error from this court. That case arose out of a suit to collect delinquent taxes of the St. Francis Levee District. The act creating that district was the first of its kind in this State, and had served as a pattern for numerous other districts creating levee, drainage, road and other improvement districts. That act was upheld both by [fol. 82] this court and by the Supreme Court of the United States, and, in the opinion of that court, it was said: "It should be kept in mind that the laws of a state come under the prohibition of the 14th amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley R. & Imp. Co., 130 U. S. 559, 32 L. Ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be 'the duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

Counsel for appellant attempts to distinguish that case from this, and one of the distinctions pointed out is that the Ballard case was a proceeding to collect an assessment of betterments in an existing [fol. 83] district, whereas this case involves the validity of a proceeding whereby the lien was imposed upon the lands lying in the district, and it is urged, therefore, that the greater publicity of that case constituted due process of law, whereas the lack of this publicity in the instant case is fatal to the validity of the district.

In support of this argument appellant insists that the demurrer filed and sustained to the allegation of the complaint, that no notice of the intention to introduce the special bill enacting this legisla-

tion was given and published as required by section 26 of article 5 of the Constitution, admitted the truth of that allegation. But this was not the effect of the demurrer. The demurrer did not admit the allegation that notice had not been given, but submitted to the court that, as a matter of law, the question was one into which the courts would not inquire, for the reason that the question of the fact of notice, as well as its form and sufficiency, was a legislative, and not a judicial, question. Booe v. Road Imp. Dist., 141 Ark. 140. In other words, a demurrer admits only those facts which are well pleaded. Pierce Oil Corporation v. City of Hope, 248 U. S. 498; Pierson v. Wallace, 7 Ark. 282, 290; Keith v. Pratt, 5 Ark. 661.

It is true that in passing upon the sufficiency of a notice to property owners to constitute due process of law we test the act by a consideration of the shortest time under which notice could be given pursuant to this requirement, and that time is twenty-eight days, and, under the facts herein stated, we think this constituted due process of law. It may be said, in this connection, that the legislature must have known that, as a practical proposition, a longer time [fol. 84] would be required to fix the lien of the assessments upon the land than the shortest period under which it was possible to do so, and such was the case here.

The showing is made that appellant, who lived in Washington, D. C., knew nothing of the assessment of her lands until she applied for a statement of the taxes due thereon in January, 1920. But this lack of information was due to her failure to keep in touch with the progress of events in this State. It was a matter of the greatest notoriety that at the 1919 session of the General Assembly a road-building program was launched of such tremendous proportions as to attract very general attention. It was commented upon everywhere. The widest difference of opinion existed as to its wisdom, but everyone at all familiar with the current history of the State had knowledge of the existence of a roadbuilding movement throughout the State. There had been a vast propaganda in the interest of good roads, which found its fruition in the enactment of special road laws in nearly, if not all, the counties of the State.

Act 245 became a law March 11, 1919. It was one of numerous other similar acts. The commissioners therein provided for proceeded immediately to carry out its purposes, and we recall no case among the numerous cases which have come before us for review in which the commissioners proceeded more expeditiously. By May 17 they had their plans and estimate of cost ready. Pursuant to the provisions of the act set out above, published notice was given on May 22 and May 29 that on June 14 a hearing would be had, at which any land owner might be heard in opposition to the approval of the proposed plans; and no one appeared to protest, either resident [fol. 85] or non-resident. This proceeding was itself a part of the publicity necessarily involved in the proceeding to assess betterments. It will be remembered that the General Assembly created this district, as it had the right to do, and defined its boundaries. It may

also be said that the General Assembly, if it had seen proper so to do, might have ascertained the betterments and assessed them against the lands; and this would have been due process of law. Salmon v. Board of Directors, etc., 100 Ark. 366; Tims v. Mack, 147 Ark. 112; Dorsey Land & Lbr. Co. v. Board of Directors, etc., 136 Ark. 524.

Here the legislature created the district and defined its boundaries. Appellant's lands were placed in this district by the action of the General Assembly itself, which was a legislative determination that those lands would be benefited by the proposed improvement of the highways within the district; and, after doing this, the act provided that the commissioners should determine the assessment of benefits and damages against the respective tracts of land in the district, and should determine, as an administrative matter, the per cent of these betterments to be levied and collected each year; and we think the notice which the act required is sufficient to constitute due process of law.

The second insistence of counsel for appellant is that the notice was insufficient in form, for the reason that it contained no description of the district itself, nor reference to the act under which the proceeding was had, nor list of lands nor names of owners, from which interested parties could ascertain what the proceeding meant.

In answer to this insistence, it will again be recalled that the dis-[fol. 86] trict is of legislative creation, and section 1 thereof created Road Improvement District No. 2 of Conway County, and gave it that name and designated its boundaries, and the published notice referred to it by its official name, and gave the time and place when and where the assessments of betterments in that district would be heard. We think this was sufficient.

The third and fourth grounds of attack may be considered together. The court sustained a demurrer to that portion of the complaint which attacked the assessments on the grounds that they were made under a mistake of fact, and that there was a discrimination in favor of, or against, certain property owners. This action of the court must be affirmed, for there must come a time when such questions are foreclosed. It was upon the faith of these assessments that the district incurred obligations and issued negotiable bonds with which to pay them; and these bonds are owned by the investing public throughout the United States. The act expressly names the time when these questions are foreclosed, and that time is ten days after the completion of the hearing on the assessments by the commissioners, except as against property owners who, within that time, have applied to the chancery court for relief.

We have in many cases upheld this limitation upon the time within which property owners may complain. The recent case of Pierce v. Drainage District No. 17, 11 Ark. Law Rep. 94, 244 S. W. 342, collects a number of them. This question was very thoroughly considered by us in the recent case of Road Improvement Dists. Nos. 1, 2 and 3 v. Crary, 151 Ark. 484, in which a very similar attack was made on an assessment of benefits. There the assessment had

been made according to the zone system, which was said to be arbi-
[fol. 87] trary and unreasonable; but we answered that and other objections to the assessment as follows: "We have often decided that the method provided in the statute for attacking the validity of the assessment of benefits is exclusive, and that it must be pursued within the time prescribed by the statute. In other words, it has been settled by repeated decisions of this court that a collateral attack cannot be made upon the assessment of benefits unless void on the face of the proceedings. Reitzammer v. Desha Road Imp. Dist., 139 Ark. 168; Summers v. Conway & Damascus Road Imp. Dist., 139 Ark. 277; Nettles v. Hazelwood Road Imp. Dist., 144 Ark. 632; Sikes v. Douglas, 147 Ark. 469."

In support of the proposition that there was no valid levy of the taxes here sought to be enjoined, it is urged that, as a jurisdictional requirement, the commissioners should have prepared and filed with the county clerk a record showing the entire levy against the entire district, with the entire cost of the improvement spread over the series of years during which it had been determined the taxes should be collected, and that without such a record there was no mandate to the county clerk to extend the taxes upon the taxbooks. It will be remembered that the county clerk is not an officer of the road improvement district, and that he would have no function to perform in the extension of the taxes on the tax books but for the fact that he is charged by law with the duty of making up the taxbooks used in collecting the general taxes, and, as the road improvement district taxes are collected at the same time, he must have the information upon which he can extend the improvement taxes against the respective tracts of land lying therein. The jurisdictional re-
[fol. 88] quirement is the action of the board in making the assessments and in authorizing their collection, to which end the county clerk performs the clerical duty of extending the taxes assessed against the land. Counsel insist that the act requires that the assessments be so made that any property owner might pay the assessment against his lands and thus stop the running of interest thereon. So it does; but we perceive no reason why appellant might not, in the beginning, have paid her assessments in full. The total amount thereof was fixed and certain, and was shown in the record of these assessments kept by the commissioners and the copy thereof filed with the county clerk, as required by section 20 of the act.

We do not think it a jurisdictional requirement that there should have been filed, along with the assessment of betterments, a certificate by the commissioners showing the entire assessments for all the years during which the assessments would be collected. We think this certificate could be made annually, otherwise no effect would be given to that portion of section 25 which reads as follows: "If the proportion of the assessment of benefits first levied is not sufficient to complete the improvement, the commissioners may make additional levies of such amounts as shall be sufficient to complete the improvement and pay all indebtedness of the district; the aggregate levy against any particular tract, however, not to exceed the assessment of benefits against that tract."

The commissioners might have made a levying order and furnished a certified copy to the county clerk in the beginning, which order would have continued in effect until rescinded or altered, or until the betterments were consumed, pursuant to the directions of section 25; [fol. 89] but this same section gave the commissioners the right to annually alter the proportion of the assessed benefits to be collected, and this necessarily implied the right to make an annual certificate of the proportion of the betterments to be collected.

The case of Jefferson v. Conway County Bridge Dist., 147 Ark. 518, announces the principle which controls here, and that is that a failure to comply with a directory provision of an act will not invalidate an assessment if the jurisdictional requirements have in fact been complied with.

The record shows that the commissioners annually determined the percentage of the assessed benefits to be levied; but, after making the necessary levying order themselves, they passed resolutions requesting the quorum court to also levy the taxes, and the quorum court did so. This was an unnecessary thing to do, and added nothing to the validity of the levy; but we do not think this unnecessary action on the part of the commissioners and the quorum court operated to invalidate the levy.

The remaining ground of attack is that the commissioners made material and unauthorized changes in the plans of the road, which invalidated the assessment. The record reflects the following facts. The road in question is a link in the Little Rock and Fort Smith highway, one of the most frequently traveled highways in the State, and the original plans called for a road only nine feet wide. It was the opinion of both the State and Federal Highway Departments that the road planned was not wide enough to carry the traffic over it, and those departments directed the laying of a sixteen-foot binder, instead of one of nine feet, and the change was made to conform to [fol. 90] the requirements of the State and Federal highway departments, and for the purpose of securing aid from those departments which would otherwise have been withheld.

The original estimated cost of the improvement was $432,000.00, and the present estimated cost is $550,000.00, or $118,000.00 in excess of the original estimate. It is not shown what part of this cost is due to the change, rather than to increased cost of construction, but it is fair to assume that most, if not all, of the increase is due to this change. In consideration of this change an allotment of $61,000.00 of Federal aid was made, of which $30,000.00 has been paid, and an additional allotment of $75,000.00 has been recommended and which the commissioners feel assured will be granted. So that this aid, if received and when received, will more than equal the increased cost.

We think the change made, although extensive in the matter of cost, was not so material as to be beyond the authority of the commissioners to make. No change in the *toure* or termini was involved, nor in the character of the road: the only change was that of increasing its width, and it appears this increased cost will be taken care of by an allowance of Federal aid which would not otherwise have

been made. It is obvious that the proposed change adds to the value of the improvement, and certainly no property owner could expect any reduction of assessments on account of the change; and if it should operate to require the levy of a larger per cent of the assessed betterments than would otherwise be the case, we are still of the opinion that the change is not so material as to be beyond the powers conferred by the act upon the commissioners in this respect. Road [fol. 91] Improvement Dist. No. 1 v. Toler, 130 Ark. 410; Hout v. Harvey, 135 Ark. 104; Carson v. Road Improvement Dist., 150 Ark. 379.

Upon the whole case we think the complaint was properly dismissed as being without equity, and that decree is affirmed.

Wood and Hart, JJ. dissent.

[fol. 92] IN THE SUPREME COURT OF ARKANSAS

No. 318

DISSENTING OPINION

HART, J. (dissentiing):

Judge Wood and myself agree that notice by publication is appropriate to the nature of the case; but we are of the opinion that a publication for two weeks only is unreasonable and, therefore, is violative of the "due process" clause of our constitution. The imposition of assessments for local improvements by a board of assessors or other special tribunal is in the nature of a judicial proceeding, and when such assessment becomes final it is in the nature of a judgment against the lands upon which it is levied. Therefore, the landowner is entitled to reasonable notice before any burden by way of special assessments is laid upon his land.

As the Hon. Jos. H. Choate once expressed it, the spirit of the constitutional rule is that the landowners shall have real bread in the matter of a hearing and a publication of the notice for two weeks only would put them off with nothing but a stone. The notice by publication is for the purpose of apprising the landowners of the stated hearing upon their assessments to be given them by the board of assessors, and the notice should be published for a sufficient length of time to give the landowner an opportunity to acquire knowledge of the assessments and to prepare for his defense to it if he should deem it arbitrary, burdensome, or discriminatory. The constitutional validity of an act must be tested, not by what has been done under it, but by what may be done by its authority.

We agree that the publication of a notice for four consecutive weeks as prescribed by the St. Francis Levee Act construed in Ballard v. [fol. 93] Hunter, 74 Ark. 174, is fair and reasonable to the landowner. We do not think that the ten days allowed the landowner, who feels aggrieved by the action of the commissioners in assessing

his lands, to file his complaint in the chancery court should be counted for two reasons. To the same effect, see, Roller v. Halley, 176 U. S. 398.

In the first place it is an established principle in all courts that the method of acquiring jurisdiction by publication is in derogation of the common law and that the statutory requirements must be strictly construed in order to confer upon the court, or other special tribunal, jurisdiction in the premises. The object of the publication is to give the landowner notice of the hearing before the board of commissioners or assessors, as the case may be, and to give him an opportunity to prepare his case. Therefore, the special tribunal ought to acquire jurisdiction in the premises before its action becomes final and not afterwards.

In the next place, this court has held that the estimate of benefits is largely a matter of opinion and that a great amount of deference is due to the judgment of the board of assessors which is constituted as a special tribunal for the purpose of determining that question. Hence it was held that courts reviewing the proceedings of the assessors should not substitute the judgment of the judges for that of the assessors unless the evidence clearly shows that the assessments are erroneous. Rogers v. Highway Imp. Dist., 139 Ark. 322, and Wilkinson v. Road Imp. Dist. 141 Ark. 164.

So it will be readily seen that the landowner does not have the same chance to have his assessments corrected by review in the courts as he would have had in the first instance before the board of as- [fol. 94] sessors, and a reasonable time should be given the landowners before the original hearing. The publication of the notice for a reasonable time is what gives the landowner constructive notice of the proceedings.

The statute provides that the commissioners shall designate a date not less than ten days after the last insertion of the notice as the date for hearing complaints of the assessments. This is a legislative declaration that the service is complete at that time. Hence it will be seen that the court should not add ten days by judicial construction to the time allotted by the legislature upon the specious plea that the landowner gets a de novo hearing in the chancery court, when, according to the settled practice of this court he gets nothing more than a review of the proceedings before the assessing board.

As a sort of make-weight argument the majority opinion says that the current history of the State shows that there had been a vast propaganda in the interest of good roads which resulted in the special road acts passed by the legislature of 1919.

We have not read the history of the times through the same glasses. According to our view there had been no public discussion looking towards the adoption of a system of constructing good roads throughout the State. Reckless and extravagant statements as to the cost of the roads and of the amount of federal aid which would be received, which were calculated to lull the landowners into non-action, were spread abroad after the passage of the special road acts.

The records of the legislature show that no notice of the intention to pass any of these special acts was given and exhibited in the Gen-

[fol. 95] eral Assembly as required by Art. 5, Sec. 26 of our Constitution. During a legislative session of sixty days one volume of general acts of five hundred and twenty-two pages was passed; and there was, also, one volume of special acts of ten hundred and sixty pages. In addition to these the Special Road Acts were published in two volumes with a total of twenty-seven hundred and sixty pages, of the size of those used in an ordinary law book. The roads provided for are not part of a system and have no relation to each other. It would have been a physical impossibility for these special acts to have been read three times, as required by our Constitution, within sixty days.

Special acts, under what is called legislative courtesy are passed upon the request of the members introducing them. Referring to the history of the times recited in the majority opinion, we find that these special road acts were enacted for all the counties in the State. Not only was there no provision for giving the landowners a voice in the necessity or expediency of passing the acts imposing the whole cost of constructing the improved roads upon the landowners, but in order to prevent a referendum to the qualified electors, the last section provides that the act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared, and it shall take effect at once.

The court records will show that many of these special acts were prepared by attorneys representing special interests; and if current history is the criterion, practically all of them were prepared by such attorneys; and protesting landowners were given no voice in the matter, although each act called for a bond issue of twenty-five or thirty years duration.

[fol. 96] Local assessments are not founded upon any idea of revenue, but upon the theory of special benefits conferred upon the adjacent lands. If an illegal method of assessment is adopted, it is the same in principle as if no assessment at all was made, and the special tax imposed amounts to an illegal exaction, which a landowner might resist whenever it is attempted to be asserted. Thus it will be seen that the system is open to grave abuses and may lead to oppression and confiscation. Hence the importance to the landowner of being given a reasonable time to act in the first hearing to the end that he may not be deprived of his property without due process of law.

The fair name and fame of our State can best be kept inviolate by giving the landowners a reasonable opportunity to be heard before fixing a burdensome, or arbitrary special assessment on their lands and such reasonable notice should be one that would carry into practical effect the declaration of our bill of rights that all men have the inherent and inalienable right of acquiring, possessing, and protecting property; and its guarantee that the right of property is before and higher than any constitutional sanction.

We recognize that after the board of assessors or other special tribunal has once acquired jurisdiction over the lands, short statutes of limitations might be provided within which to review these assessments. The landowner is then already in court, so to speak, and

should prosecute with diligence his right to review the finding of the board of assessors to the end that the construction of the improvement may not be unduly delayed.

Protesting as we have often done before against the zone system [fol. 97] of assessing road districts, we believe that the present case goes further than any other previous decision in upholding such a system. It is true that the legislature may commit to a special tribunal the power of apportioning the cost of an improvement and assessing the expense thereof unless the method prescribed is plainly unadapted to arriving at a fair and equitable result. The legislature has no power itself to make arbitrary assessments, or to grant power to a subordinate tribunal that may be so exercised.

In Bush v. Delta Road Imp. Dist., 141 Ark. 247, we expressly stated that the power to make special assessments for local improvements and the power of apportioning them are identical and inseparable. Hence it was held in the last cited case in making the assessment it is proper to consider the nature and location of the lands in district, the condition and character of the improvement, the cost and relative value of the property to the assessment and as well the fact whether the plan and method adopted has resulted in imposing a burden in substantial excess of the benefits or disproportionate as between the landowners in the district.

In other cases we have recognized that local assessments may so transcend the limits of equality and reason that its exaction would cease to be a tax and become extortion and confiscation. Coffman v. St. Francis Drainage District, 83 Ark. 54, and McClelland v. Pittman, 139 Ark. 341. Relief was denied in the case last cited because the complaint did not allege the specific facts which would constitute the arbitrary abuse of power. In other words, the legislature cannot act or authorize a subordinate tribunal to act upon an illegal principle of assessments or arbitrary method in making or apportioning it. [fol. 98] In re Washington Avenue, 69 Penn. St. 352, the court expressly stated that taxation has a limit per se, and is not always coextensive with legislative exaction. Continuing the court said:

"But, nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way of which the legislature my judge, but within the just limits of what is taxation. Like the rain it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

This court had this principle under consideration in Ratcliff v. Scruggs, 46 Ark. 96. In that case the court had under consideration a statute which provided in substance that all actions to test the validity of any proceeding in the appraisement, assessment, or levying taxes upon any land and all proceedings seeking to show any irregularities of any officer having any duty to perform in the assess-

ment, appraisement, levying of taxes, or in the sale of land delinquent for taxes or proceedings seeking to avoid any such sale for irregularities shall be commenced within two years from the date of sale and the court held the act to be unconstitutional. In discussing the statute the court said:

"But in this sweeping enactment the legislative department transcended the boundaries of its powers. It could not, under the consti- [fol. 99] tution of 1868, or any similar constitution, enact a statute which should transfer one man's property to another, under a guise of a sale for non-payment of taxes, when there had been no assessment or no levy of taxes. This would not be due process of law. Neither could it prescribe a short period of time, nor indeed any period, within which the owner must make his objections for such fundamental defects, he remaining in possession and being, in the instance supposed, in no default for not paying his taxes."

Again in Stiewell v. Fencing District No. 6 of Johnson County, 71 Ark. 17, the court had this principle under consideration as applied to improvement districts, and it was held that defects which are jurisdictional and indispensable could not be cured by limitation statutes; and the case of Ratcliff v. Scruggs, supra, was cited to support the holding.

A short recitation of the undisputed facts in this case will show that the assessment of benefits by the zone system in this case resulted in an arbitrary discrimination against the appellant. She owned a farm comprising about 3,000 acres, but only 700 acres are in cultivation or susceptible of being put in cultivation by any practical method. The rest of her lands are covered by lakes and other bodies of water, to such an extent, that according to the undisputed evidence, it is not practical to drain it and thereby render it fit for cultivation. Notwithstanding this all her lands were assessed under the zone system and the lands under water was assessed at the same rate as those in cultivation where they were the same distance from the road. The board of assessors were bound to know the condition, the character, and configuration of the earth's surface within the proposed district. We recognize that courts cannot review the power of [fol. 100] the legislature, or its subordinate agency in the premises, unless the assessment has been made upon a demonstrable mistake of facts, or that in making it the legislature or its subordinate agency applied an illegal principle, or arbitrary method of assessment.

The zone system as applied in the present case under the undisputed evidence fails, as unreasonable and not a fair substitute for a valuation made by a designated tribunal acting according to law, and therefore violates the "due process of law" clause in our constitution, which is a limitation upon arbitrary power and is a guaranty against arbitrary legislation. When the condition and character of the soil, and the configuration of the earth's surface is taken into consideration, it is evident that the zone system of assessments in road improvevment districts is necessarily arbitrary and discriminatory.

It is not like the case of a drainage or levee improvement district where the land is covered with water and the construction of the drainage ditch or the levee reclaims it. In such case it is impossible to foresee exactly how a proposed tax will fall, and if the construction of the improvement increases the value of the different classes of land within the district proportionately, the burden will be distributed in as fair and just way as can be done. But in a road improvement district the case is different. The road which it is proposed to improve is already laid out and in use; it serves the landowners adjacent to it and as well the general public. As above stated its situation with reference to the land is known in advance of the assessment. To charge the cost of the improvement upon farm lands lying within a [fol. 101] designated distance on each side of the road at a fixed sum per acre, necessarily results in discrimination and is so obviously onerous and unreasonable, that it cannot on any fair principle of reasoning and justice be said to be a valuation according to benefits.

The kind and character of the soil and topography of the lands in the district do not change. Natural objects such as lakes, streams, hills, and hollows remain the same, so that it cannot be said that the proof might be one way in one case and another way in a subsequent case. If an arbitrary or illegal method of assessment is adopted in the first instance, it is the same as if there had been no assessment of benefits, and the land owner has a right to resist at any time a suit to place a lien upon his property as an illegal exaction if he remains in possession of his land by himself or through tenants.

Therefore, we respectfully dissent without expressing our opinion on the other questions raised by the learned counsel for appellant.

[fol. 102] STATE OF ARKANSAS, ss:

SUPREME COURT

CLERK'S CERTIFICATE

I, W. P. Sadler, Clerk of the said court, do hereby certify that the foregoing is a true, full and complete transcript of such of the record and proceedings in the case of Mrs. M. L. House, Plaintiff v. Road Improvement District No. 2 of Conway County, and R. E. Bartlett, Sheriff, Defendants, and also of the opinion of the court rendered therein, as called for in the stipulation of counsel filed herein and attached to this transcript, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 15 day of June, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

[fol. 103] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 4, 1923

Now comes Mrs. M. L. House, Petitioner herein, and plaintiff in error, by her attorneys, Joseph M. Hill and Henry L. Fitzhugh, and in connection with her petition for writ of error makes and declares the following assignment of errors, to-wit:

First. The Court erred in deciding that the notice authorized by Atc 245 of the General Assembly of 1919, which notice provided for a publication once a week for two weeks of the hearing upon the assessments of benefits levied against real property in the district, and which notice in this case was published in a weekly newspaper in Conway County, Arkansas, in its issues of June 18th and 25th, 1919, advising all persons to file their objections to their assessments in writing before July 7, 1919, and stating upon which date the Commissioners would hear and determine such objections so filed in writing before said date, was due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States.

Second. The Court erred in deciding that the notice in the form prescribed by Section 20 of Act 245 of 1919, which is as follows:

"Notice of the Assessment of Benefits in Road Improvement District No. — of Conway County, Arkansas

Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number — of Conway County has been completed and is on file with the secretary of said commissioners, and is open for inspection, and a copy of said assessment of benefits and damages is on file in my office and open to inspection and that the said commissioners for said district will on the — day of —— ——, attend at ——, Conway County, for the purpose of hearing any complaints against any of said assessments of benefits or [fol. 104] damages. Any complaint of any of said assessment of benefits or damages must be filed with the secretary of said commissioners in writing before the date of said hearing," and which notice was given in the above form in this case, said form being filled in by inserting the number of the district, the name of the clerk and the date and place of the hearing, constituted such notice as complied with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third. The Court erred in deciding that the system of levying special assessments as pursued by the Commissioners of the defendant district acting under said Act 245 of 1919, when applied to the assessment of the appellant's property was valid, instead of holding the same to be arbitrary under the facts herein and in not deciding that the said action of the Commissioners in applying the system

which they did apply under authority of said Act 245 amounted to taking plaintiff's property without due process and deprived her of equality before the law.

By reason whereof, this Petitioner and Plaintiff in Error prays the decision of the Supreme Court of Arkansas may be reversed and justice done.

Done this 4 day of June, 1923.

Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Petitioner and Plaintiff in Error.

[File endorsement omitted.]

[fol. 105] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed June 4, 1923

To the Honorable E. A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas:

Comes Mrs. M. L. House, the appellant in an action lately pending in this Court, wherein she was the appellant and Road Improvement District No. 2 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, were the appellees, and represents that on the 21st of May, 1923, final judgment was entered by the Supreme Court of Arkansas, affirming the decree of the Conway Chancery Court, in a suit in equity wherein said appellant was the plaintiff, and said appellees herein named were the defendants, wherein her complaint in equity was dismissed with a judgment against her for costs and the taxes sought to be enjoined.

That this was a complaint in eq-ity filed by her, as property owner in Road Improvement District No. 2 of Conway County, Arkansas, wherein an assessment of special benefits amounting to $19,035.00 had been levied against her property in said District; that said District was created under Act 245 of the General Assembly of 1919. That said Act provided for a notice to be given by the Commissioners after they made their assessments of a hearing of any objections thereto, and provided for two weeks' notice to be given by publication in a weekly newspaper, and for said objections to be filed in writing prior to the date set for said hearing; that said notice was given as prescribed in said Act and was published for only two weeks, and said notice was in a form which did not mention the Act under which said Commissioners were proceeding, did not describe the boundaries of the District, the location thereof of the lands therein to be affected, nor persons therein to be affected.

[fol. 106] That the appellant was a non-resident of the State of Arkansas, and was residing in the City of Washington, D. C., during

all the time proceedings were had under said Act and did not learn of said proceedings until long thereafter.

That her complaint in equity alleged that said notice was not in accordance with due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and was not in form sufficient to convey notice as required by said due process provision of said Amendment, and the defendant specially set up her right and immunity to said levy of taxes against her land without due and proper proceedings in accordance with the law of the land and she denied the proceedings had were in accordance therewith.

She further alleged that the assessment as made by the Commissioners pursuant to the terms of the Act were arbitrary and that the system which they pursued in assessing her property placed upon her property a greater burden than upon similar property similarly situated, and is discriminatory, and denied her the equal protection of the law and resulted in taking her property without due process of law.

That the decision of the Conway Chancery Court was against her contentions and denied her the rights and privileges which she specially set up and claimed under the Constitution of the United States and the Supreme Court did, on the said 21st day of May, 1923, affirm said decision.

Your petitioner alleges that said decision denies to this appellant the equal protection of the laws and takes her property without due process; and your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors filed herewith.

[fol. 107] Wherefore, your petitioner prays that a writ of error may be issued in this cause from the Supreme Court of the United States to the Supreme Court of Arkansas for the correction of errors so complained of, and that a transcript of all of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court, may be sent to the Supreme Court of the United States as provided by law.

Dated this 4th day of June, 1923.

Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Petitioner and Plaintiff in Error.

Upon the consideration of the above and foregoing petition for writ of error it is ordered that said writ of error issue upon the execution by the appellant, Mrs. M. L. House, of a bond in the sum of $1.000.00, said bond to be conditioned as prescribed by the law and practice in such cases and such bond when approved to act as a supersedeas.

Given under my hand and seal this, the 4th day of June, 1923.

E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 108] BOND ON WRIT OF ERROR—Filed June 4, 1923. [For $1,000; approved, McCulloch, J.; omitted in printing]

[File endorsement omitted.]

[fol. 109] WRIT OF ERROR—Filed June, 4, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Chief Justice and Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings and in the affirmance of the decree of the Conway Chancery Court, as also in the rendition of the judgment of a plea which is in the Supreme Court of Arkansas before you, being the highest Court of law or equity, of said state in which a decision could be had in the suit between Mrs. M. L. House, appellant, and Road Improvement District No. 2, and R. E. Bartlett, Sheriff, of Conway County, Arkansas, appellees, wherein was drawn in question the validity of a statute of and an authority exercised under said state on the ground of the statute and authority exercised under it being repugnant to the Constitution of the United States and the decision was in favor of the validity of the statute and the act of the state thereunder, and wherein a right, title, privilege and immunity was claimed by the said Mrs. M. L. House under the Constitution of the United States, and the decision was against the right, title, privilege and immunity especially set up and claimed under said Constitution, a manifest error hath appeared to the great damage of the said Mrs. M. L. House as by her complaint it appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this, the 4th day of June, 1923.

Sid B. Redding, Clerk of the United States District Court for the Eastern District of Arkansas, By W. P. Field, D. C.
(Seal of the District Court, Eastern District of Arkansas.)

Allowed by E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 110] STATE OF ARKANSAS, ss:

SUPREME COURT

CERTIFICATE OF LODGMENT

I, W. P. Sadler, clerk of said court, do hereby certify that there was lodged with me as such clerk on June 4, 1923, in the matter of Mrs. M. L. House vs. Road Improvement District No. 2 of Conway County et al.—

1. The original bond of which a copy is herein set forth.

2. Three copies of the writ of error, as herein set forth.

3. Two copies assignment of errors, and prayer.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 15th day of June, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

[fol. 111] IN SUPREME COURT OF ARKANSAS

CITATION AND SERVICE—Filed June 4, 1923

The United States of America to Road Improvement District No. 2 of Conway County, Arkansas, and R. E. Bartlett, Sheriff:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Arkansas, wherein Mrs. M. L. House is plaintiff in error, and Road Improvement District No. 2 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Supreme Court of Arkansas, this 4 of June, 1923.

E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas. Attest: W. P. Sadler, Clerk of the Supreme Court of Arkansas, By C. R. Stevenson, D. C.

We acknowledge receipt of copy of attached citation, and waive formal service thereof.

Given under our hands this 4th day of June 1923.

Grover T. Owens, S. Lasker Ehrman, Attorneys of Record for Road Improvement District No. 2 of — County, Arkansas, and R. E. Bartlett, Sheriff.

[File endorsement omitted.]

[fol. 112] UNITED STATES OF AMERICA, ss:

SUPREME COURT OF ARKANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings called for in the stipulation of the parties filed in this case.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this 15 day of June, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

Costs of Suit

Clerk's Costs	$12.75
Sheriff's costs	7.25
Plaintiff's Depositions	78.50
Defendant's Depositions	76.40
Making this transcript	30.00
	205.90
Filing fee Supreme Court	11.50
Appellee's briefs	15.00
Cost of this transcript	31.50
Binding transcript	.75

[fol. 113] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED

It is hereby stipulated that Act 245 of the General Assembly of the State of Arkansas of 1919 be not printed at length as contained in the Record, but that the following sections only be printed, to wit:

Section 18. Which begins at Page 47 in the Record.
Section 19. Which begins at Page 48 in the Record.
Section 20. Which begins at Page 49 in the Record.
Section 21. Which begins at Page 51 in the Record.

Joseph M. Hill, Henry Fitzhugh, Attorneys for Plaintiff in Error. Grover T. Owens, S. Lasker Ehrman, Attorneys for Defendants in Error.

[File endorsement omitted.]

Endorsed on cover: File No. 29,693. Arkansas Supreme Court. Term No. 383. Mrs. M. L. House, plaintiff in error, vs. Road Improvement District No. 2 of Conway County, Arkansas, and R. E. Bartlett, sheriff of Conway County, Arkansas. Filed June 22nd, 1923. File No. 29,693.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923

No. 383

MRS. M. L. HOUSE, PLAINTIFF IN ERROR

vs.

ROAD IMPROVEMENT DISTRICT NO. 2 ,OF CONWAY COUNTY, ARKANSAS, ET AL., DEFENDANTS IN ERROR

BRIEF OF THE PLAINTIFF IN ERROR

STATEMENT

The plaintiff in error brought a suit in equity in the Conway Chancery Court seeking to annul a lien against her lands in Conway County amounting, without interest, $19,-035.00. The attacks upon her assessment was that the notice was not sufficient to constitute due process either in time given, or in form, and that there was gross discrimination in the assessment of her lands, and that a wrong method was pursued, and that the same had been made under a mistake of fact, and the Road District should be estopped from pleading limitation.

In addition to said attacks bottomed upon rights which she asserted under the Constitution of the United States the complaint also attacked the assessment upon three grounds:

First: That the preliminary estimate as to the cost of the improvement was not filed as required by the Act creating the District, and

Second, That the District had materially changed its plans, and,

Third: That the levy of the annual tax had not been duly made as required by the Act.

The Chancery Court heard the evidence upon these issues and decided them against the plaintiff in error, and that decision was affirmed by the Supreme Court.

Therefore, that left for consideration in this Court only the attacks upon the District which are claimed to be in violation of the Constitution of the United States.

A demurrer to the complaint and amendment to the complaint setting out the plaintiff's cause of action was sustained, and it was stipulated that in the sustaining of said demurrer the Court also considered certain facts which were proved, in regard to the method of making the assessment. Therefore, in stating the case we will omit all references in the complaint to the attacks based upon the non-federal rights asserted and confine the statement of the case to the claims presented under the Constitution of the United States, which have been denied by a majority of the Supreme Court of Arkansas.

The Complaint

The plaintiff alleged that she was and had been during all the times complained of in the Act a resident of the City of Washington, D. C., and that she owned lands in the District which were assessed as 3,217 acres, but as a matter of fact her acreage was less on account of part of it being carried away by the Arkansas river, upon which the land abutted. That her lands were valued in the State and County assessment at $43,030.00; that the assessment against her land in the defendant Road District was $19,035.00, which is to be paid in twenty annual installments of $1,516.15, amounting to a charge against her lands of $30,323.00.

A list of her lands and the assessed value and the amount of benefits assessed against each tract and the distance each is from the improved road is attached to her complaint as "Exhibit A." (R. p. 12.)

The General Assembly of 1919 passed Act No. 245, creating four road districts in Conway County, Arkansas, including the defendant district. That Act was local and special and

notice of an intention to apply therefor was not published in the locality where the lands to be affected were situated thirty days prior to the introduction of the Act in the General Assembly, and no evidence of such notice was exhibited to the General Assembly before the Act was passed, and the said Act was unnecessary as a general law providing for the creation of road districts was in force and could have been made applicable; alleges that said Act was passed in contravention to Sections 25 and 26 of Article V of the Constitution of 1874, but the plaintiff did not allege that said Act was void on account of the non-compliance with the provisions of the Constitution and alleges materiality of this allegation on the subject of notice is that if the provisions of the Constitution requiring notice to be published in the locality for thirty days before the Special Act was introduced had been complied with, she would have had the better opportunity of ascertaining the proceeding against her lands, and alleges that if the proceedings had been pursued under the general law, that she would have had more full and ample notice of said proceedings than is provided in said Special Act No. 245.

She alleged she had no information whatever of the passage by the General Assembly of Act No. 245 until long after the proceedings under that Act had fixed a lien upon her property. That said Act provides that the Commissioners should make plans for the improvement contemplated and an estimate of the costs thereof and file the same with the County Clerk. That immediately thereafter the Clerk should give notice by publication for once a week for two weeks in some newspaper published in the county, designating the date when the County Court would consider the plans, and that the last insertion of the notice should not be less than five days before the consideration of the plans by the County Court.

That the Act made it the duty of the County Court on said date to consider the plans and hear any property owner interested therein, and to adopt, modify or reject the plans, and, when approved, they should be the plans of the District. That the defendant District proceeded thereunder to form said plans and gave notice for the hearing before the County Court of less than twenty days; that said plans were approved by the County Court on June 14, 1919.

That the Act provided that immediately after the approval of the plans by the County Court the Commissioners should

proceed to make an assessment of benefits to be received by each tract of land in the District and the assessment containing the same should remain with the Commissioners and a copy filed with the County Clerk.

That three days after the plans were approved by the County Court the Commissioners filed the assessments on June 17, 1919, and the Clerk issued a notice in the form prescribed in said Act 245, which notice was as follows:

"Notice is hereby given that the assessment of benefits and damages in Road Improvement District No. 2, of Conway County, Arkansas, has been completed and is on file with the Secretary of said Commissioners and is open to investigation and a copy of said assessments of benefits and damages is on file in my office and open to inspection and that said Commissioners for said District will on the 7th day of July attend at the First National Bank, Morrilton, Conway County, Arkansas, for the purpose of hearing any complaint upon any of said assessments of benefits or damages. Any complaint of any of said assessments of benefits or damages must be filed with the Secretary of said Commission in writing before the date of said hearing.

Witness my hand and seal as such County Clerk, this 17th day of June, 1919.

(R. p. 1.) J. L. Williams, Clerk."

That the notice was published in the Conway County Unit, a newspaper published in said County, on June 18th and on June 25th, and published in the Conway County Democrat on June 19, 1919.

That said notice and said Act required the landowners to file their objections to the assessment of benefits on or before July 6, 1919, and the first publication being on June 18th, under the rule for computation in Section 9756 of Crawford & Moses' Digest there were but sixteen days actual notice given and the said notice as given was in compliance with the statute.

The plaintiff alleged that she had no actual notice of this proceeding, saw no copy of the newspaper and had no information whatever as to the creation of the District, or of the proceedings of the Commissioners in adopting the plans, the orders of the County Court in approving the same, nor the proceedings of the Commissioners in assessment of her

lands with benefits until long after said proceedings were had.

That Section 21 of Act 245 gives any person who has complained in writing of his assessment of benefits and who feels aggrieved by the action of the Commissioners and any other person whatever who may have objection to any assessment of benefits a right to file his complaint in the Chancery Court within ten days after the hearing by the Commissioners, which hearing in this case was on the 7th of July, 1919.

That the plaintiff had no knowledge or information of said hearing and had constructive notice of only sixteen (16) days in which to file her complaint before the hearing, and did not have the opportunity of availing herself of said remedy by a suit in the Chancery Court within the ten days allowed by the Act after July 7th.

Plaintiff alleged that she was entitled to due and timely notice before the assessment became a lien against her land of a hearing as to the justice and equity of the same and that she was not given such hearing by said constructive notice by the publications aforesaid, the utmost time for which would have been seventeen days, and that such purported notice for such short period of time was manifestly insufficient; and the provisions of the statute authorizing it and as thus carried out by the Commissioners amounted to a denial of justice. Then she alleged the same was in conflict with the provisions of the Constitution of Arkansas, which were enumerated.

The plaintiff further alleged that the filing of said assessment against her lands as set forth in "Exhibit A" and the same becoming final and a lien upon her property on July 7, 1919, on account of her failure to file in writing her objections thereto on or before July 6, 1919, as provided in said Act and notice, and that the only notice of such proceedings authorizing said lien to be created was the publication of the notice hereinbefore set out, to-wit: the publication of said notice in the "Conway County Unit" on June 18th and June 25th, and in the "Conway County Democrat" on June 19th, and that such notice was not such notice as is required to constitute due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The plaintiff alleged that the act of the defendant District acting under and in pursuance to Act 245 of the General

Assembly of 1919, amounted to the State through such agency depriving the plaintiff of her property without due process of law, and such proceedings was void as in conflict with the Fourteenth Amendment to the Constitution of the United States, and the plaintiff sets out and relies upon the same as her cause of action in praying the Court to declare void the assessment against her property made final by said Act and such proceedings of the 7th of July, 1919.

Plaintiff further alleged that having no notice in fact of said proceedings she had no opportunity to take an appeal within ten days thereafter, as provided in Section 21 of said Act, which she stated she might have taken had she known of said proceedings, and alleged that during said ten days she was residing at her home in the City of Washington, in the District of Columbia, and had no knowledge or information of any of said proceedings until long thereafter.

Plaintiff reiterates in another form her charges that said notice was insufficient under the Fourteenth Amendment, and further alleged that if the said ten days provided in said Act for bringing suit in the Chancery Court after the hearing on July 7th could be tacked to and counted in the time given her by law for contesting the assessments, that the same would be unreasonably short, amounting to in all only 26 days of constructive notice before her property was taken.

Plaintiff further alleged that said ten days cannot be added to and tacked to the sixteen days notice constructively given of said hearing, because the notice of such hearing did not give any information that such length of time would be given; on the contrary, said notice stated: "Any complaint of any of said assessments of benefits or damages, much be filed with the Secretary of said Commissioners in writing before the date of said hearing," thereby affording only notice of that which it gave, which was of this hearing on July 7th, and did not give any information of the creation of said District by Special Act of the General Assembly.

Plaintiff further alleged that the notice prescribed in Section 20 of said Act 245 is insufficient (the text reads *sufficient*, but the context shows it a clerical mistake) on its face to constitute notice to the plaintiff and other landowners of the assessment made against their property. That said notice does not give the names of the landowners of the land, nor a description of the land, nor any reference to any

Act of the Legislature, proceedings of any Court, or any other source of information by which those reading and receiving the notice would be notified that their land was within the District assessed.

That the notice of the filing of the plans of the road improvement required by Section 18 does not impart information of the land affected by the said plans and given no reference to any act, map, or order of Court by which the lands to be affected by the purported improvement could be identified.

That the Act itself did not name any date for hearings, leaving said hearings as to plans and as to contesting assessments to be given by the Clerk of the County Court and prescribed a form which was sufficient to give the information required under the Act. That the only source of information as to the existence of said Act was an examination of Acts passed by the General Assembly in the office of the Secretary of State. That the said Acts were not printed and distributed and given circulation until long after the things and matters herein complained of occurred.

That the said Act itself being passed contrary to the Constitutional provisions that notice should be given of its introduction, should of itself constitute no notice.

Plaintiff alleged that the notice as given by the commissioners were in conformity to the Act and is insufficient to constitute such notice as is required by due process of law before a lien can be legally created against plaintiff's property.

Then the plaintiff alleged the notice was insufficient to meet the requirements of the State Constitution as to due process of law and insufficient to be proceedings conformable to the law of the land and is insufficient to meet the requirements of the Fourteenth Amendment to the Constitution of the United States forbidding any State or any agency of the State to take property without due process of law.

Plaintiff further alleged that as a non-resident of Arkansas and a resident of the District of Columbia, she was not chargeable with notice of the Special Act passed by the Legislature contrary to the constitutional provisions of previous notice of its introduction, and her ignorance of said law was a mistake of fact of which equity should give relief.

Plaintiff alleged that the assessment of benefits against her property were excessive, unreasonable and discriminatory, for which she was entitled to relief in equity for the following reasons:

That the Commissioners in assessing the benefits took as a basis therefor the valuations on the tax books of 1917, assuming that all property was assessed on the tax books equally, because it had been equalized by the Equalization Board, and the Commissioners divided the land into three zones: Zone 1 containing all land within one mile of the roads; Zone 2, all land over one mile from the road, and within two miles of the road, and Zone 3, all other lands in the District; and the Commissioners alleged that they assessed Zone 1 at 50% of the assessed valuation; Zone 2, at 40% and Zone 3 at 30% and that they made allowance for property found in two or more road districts and also property especially benefitted.

The stipulated facts which were considered in determining the demurrer show these facts slightly different from those alleged in the complaint, and the stipulated facts were considered by the Court as explanatory of the pleadings in passing upon the demurrer as explained in the stipulation (R. p. 2), which stipulated facts are as follows:

The Commissioners made the assessment of benefits in June, 1919, and accepted as the basis thereof the 1917 real estate assessments, it then being the last real estate assessment which had been approved by the County Board of Equlization, and the Commissions assumed it was correct and made no personal inspection of Mrs. House' lands. They divided the District into three zones and assessed all property in Zone 1 at 50% of the 1917 county assessment; in 2 at 40%, and Zone 3 at 30%. Generally speaking, Zone 1 was land within one mlie of the road; Zone 2 was land within two miles and Zone 3 was the balance of the District, with these exceptions:

If land was in another Road District it was placed in Zone 2, irrespective of distance from the improvement, and all lands south of the road extending to the river, irrespective of distance, was placed in Zone 1, except so much of it as was in another Road District. This was done because there was no other improved road between this road and the river.

This rule was applied to Mrs. House' land, but not

exactly. She has 920 acres, also included in District No. 5, and it was assessed in District No. 2 at 33⅓%, except two tracts at 50%, although much of it was more than two miles from the road, but all of it was between the improved road and the river, and was on account of said location classed as Zone 1, irrespective of distance from the road (R. p. 2).

Returning to the allegations of the complaint, it was alleged that prior to 1917 the plaintiff's land had been valuable for cypress timber, and about the year 1906 she sold the cypress timber for the sum of $35,000.00 and gave the purchaser ten years to cut the same, and said timber was all cut from her lands by the year 1915, and its value decreased to the extent of the sale of her cypress timber thereon.

Notwithstanding said fact the 1917 assessment carried lands at the higher valuation originally induced on account of the valuable timber thereon (R. p. 9).

Returning to the stipulated facts in regard to this allegation, which are more definitely stated than in the complaint, the facts were as follows:

After the assessment of benefits was made and filed by the Commissioners, but before the hearing of the same on July 7, 1919, the County Assessor and Township Board of Assessors, the then assessing officials of the county, reduced Mrs. House' county assessment on the lands included in the District from $43,030.00 to $30,323.00, but this fact was not known to the Commissioners until long thereafter, and had it been known to them before their benefit assessments became final on July 7, 1919, they would have used it as the basis instead of using the 1917 county assessment as the basis (R. pp. 2-3).

It was further stipulated that Mrs. House lived in Washington, D. C., for eleven years prior to the filing of the complaint and at no time had any agent in Arkansas authorized to act for her in matters of taxation, other than in the year 1919, when she retained Mr. C. C. Reid, an attorney of Little Rock, to represent her before the Equalization Board of Conway County, for the purpose of obtaining a reduction in her assessment for State and County purposes (R. p. 3).

Returning to the allegations of the complaint, it was alleged that by using the higher valuation of 1917, notwithstanding its reduction, the plaintiff was assessed on the

basis of 30% higher than other property in the District similarly situated (R. p. 9).

It was further alleged that the assessment of the defendant District calls for 3,217 acres of land, whereas 300 acres of her land had been washed away by the Arkansas river and was non-existent as land.

That her property consists of 700 acres in cultivation, which is good bottom land, for which she is willing to be taxed as high as any other lands in the vicinity.

In addition she owns between 200 and 300 acres that could, at some considerable expense, be placed in a state of cultivation; that about 250 acres of her land consists of rocky ridge, unfit for cultivation, or any other purpose, and is of practically no value. That about 1,743 acres of her land consists of bayous, lakes and cypress brakes and is unfit for cultivation, has no valuable timber upon it and is waste land and could only be reclaimed by excessive expenditures for drainage and levee purposes; that there are no houses or other improvements upon the land of any considerable value. That $1,000.00 would be an excessive valuation for all the improvements thereupon.

That notwithstanding these facts, the valuation which the Commissioners used to assess benefits failed to take into consideration the character of this land and the fact that the timber which had once given it value had been removed therefrom.

That the assessments against her land are grossly discriminatory. That in many instances much better land than hers, lying within a levee district and protected from overflows by the levee, are assessed for much less than her land of less value is assessed.

That other lands immediately adjacent to hers and of like character and value are assessed much lower than her land.

That there is no equality in the assessments of benefits in said District and her lands are discriminated against in having higher assessments placed thereupon than lands of similar value are assessed.

She alleged the first information she had of the passage of Special Act No. 245 and of the assessments of benefits against her land was in January, 1920, when she wrote to

ascertain the amount of taxes due for 1919. That in order to avoid the penalties which would be incurred against her lands she paid to the defendant District the sum of $1,516.10 under protest.

The plaintiff alleged that she had frequently since learning of the arbitrary and excessive assessments against her land appealed to the Commissioners of the defendant District for relief; that they have denied the same unto her, and notwithstanding these facts the defendant District is attempting to collect against her for the assessments of 1920 the sum of $1,516.15, and the defendant, R. E. Bartlett, as Sheriff of said County, has a warrant for the collection of said tax against her land, and under the provisions of said Act, unless the same is paid within a short time it will be levied upon, and under the provisions of said Act 245 unless the same is paid within a short time there will be a penalty of 25% added to the aforesaid amount and the Sheriff is required to proceed to collect said assessments and penalties.

She prayed an injunction against the Sheriff and against the imposition of penalties until a hearing was had, and that if any sum be found due against her land that she be given a credit for the excessive payment of 1919, paid under compulsion and duress and over her protest.

She prayed that the assessment against her land be declared null and void and the defendants restrained from selling the same, and for general relief (R. pp. 1-11).

Amendments to the Complaint

An Amendment to the Complaint to conform to the proof brought in matters non-federal in character and is not now for consideration, as these non-federal attacks upon the District failed and left the plaintiff to stand in this Court upon the attacks made upon the District, based on her rights under the Fourteenth Amendment.

An additional amendment to conform to the proof, however, presented a matter for consideration of this Court and is found at pages 13-15 of the Transcript.

It set forth in detail the discriminatory nature of the assessment against her land and amplified the general allegations of the Complaint on that subject.

The purport of these allegations is that the Commissioners

were ignorant of the character of her land when they made the assessment, or else wilfully perpetrated a fraud upon her. The purport of the allegations are that the assessment amounted to a confiscation of her property, and the discrimination is so gross that it amounts to a demonstrable mistake and operates as a fraud, and that the Commissioners, instead of exercising their own judgment of value, accepted the excessive and discriminatory county assessment as a basis, in violation of their duty.

That the plaintiff was without the State during the time complained of and had no knowledge of the facts complained of, and, as soon as she obtained knowledge, sought relief from the Board and, failing to obtain same, therefore brought this suit. She alleged that the Commissioners should be estopped in equity and good conscience from setting up the limitation in Act 245 even if it is applicable, which the plaintiff denies for the reason that the Commissioners' demonstrable mistake was unintentionally made, and not known either to themselves or the plaintiff until after said period had run, and to allow them now to avail themselves of it would be the assertion of rights based on fraud or mistake, which is contrary to the principles of equity.

The Answer

The answer denied all the allegations of the complaint which presented the non-federal questions (R. pp. 15-18).

The Demurrer

The defendants demurred to all the allegations of the complaint which asserted rights under the Fourteenth Amendment, and specifically demurred to every word, line and paragraph which attacked the validity of Act 245, and specifically demurred to every word, line and paragraph of the complaint and amendments thereto, which alleged that the notice to the property owners of the filing of the plans and specifications and the filing of the assessment of benfits was insufficient, and contrary to the Fourteenth Amendment, and specifically demurred to every word, line and paragraph in the complaint and amendments which alleged the assessment of benefits as finally fixed by the defendants was erroneously fixed and contrary to the Fourteenth Amendment, and stated that the same is insufficient to constitute a cause of action, and specifically demurred to every word, line and paragraph in the complaint, and every

allegation therein, including the amendments to the complaint in which it is alleged that the Court has authority to re-open the assessment of benefits and readjust the same (R. p. 19).

THE DECREE

The Court sustained the demurrer to the complaint and heard the issues as to the non-federal questions, that is, whether the preliminary estimate of costs was filed; whether there had been material change in the plans; whether the levy of the annual tax had been duly made, and determined those against the plaintiff (R. pp. 22-24).

ASSIGNMENT OF ERRORS

Now comes Mrs. M. L. House, Petitioner herein, and plaintiff in error, by her attorneys, Joseph M. Hill and Henry L. Fitzhugh, and in connection with her petition for writ of error makes and declares the following assignment of errors, to-wit:

First. The Court erred in deciding that the notice authorized by Act 245 of the General Assembly of 1919, which notice provided for a publication once a week for two weeks of the hearing upon the assessments of benefits levied against real property in the district, and which notice in this case was published in a weekly newspaper in Conway County, Arkansas, in its issues of June 18th and 25th, 1919, advising all persons to file their objections to their assessments in writing before July 7, 1919, and stating upon which date the Commissioners would hear and determine such objections so filed in writing before said date, was due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States.

Second. The Court erred in deciding that the notice in the form prescribed by Section 20 of Act 245 of 1919, which is as follows:

"Notice of the Assessment of Benefits in Road Improvement District No.——— of Conway County, Arkansas.

Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number—— of Con-

way County has been completed and is on file with the secretary of said commissioners, and is open for inspection, and a copy of said assessment of benefits and damages is on file in my office and open to inspection and that the said commissioners for said district will on the——day of————————, attend at———, Conway County, for the purpose of hearing any complaints against any of said assessments of benefits or [fol. 104] damages. Any complaint of any of said assessment of benefits or damages must be filed with the secretary of said commissioners in writing before the date of said hearing," and which notice was given in the above form in this case, said form being filled in by inserting the number of the district, the name of the clerk and the date and place of the hearing, constituted such notice as complied with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third. The Court erred in deciding that the system of levying special assessments as pursued by the Commissioners of the defendant district acting under said Act 245 of 1919, when applied to the assessment of the appellant's property was valid, instead of holding the same to be arbitrary under the facts herein and in not deciding that the said action of the Commissioners in applying the system which they did apply under authority of said Act 245 amounted to taking plaintiff's property without due process and deprived her of equality before the law.

By reason whereof, this Petitioner and Plaintiff in Error prays the decision of the Supreme Court of Arkansas may be reversed and justice done.

CONSTRUCTIVE NOTICE IN ARKANSAS

Before proceeding to a discussion of the facts presented in the instant case on the sufficiency of notice to constitute due process, it is thought that it will be helpful to the Court to present to it briefly the statutes of the State providing for constructive notice, whereby property of non-residents may be taken under judgments, or other proceedings.

References will be to Crawford & Moses' Digest.

Under the general provisions of the Code of Civil Procedure (Section 1159) a warning order is required to be issued, warning the defendants to appear within thirty days

and the warning order must be published weekly for at least four weeks (Section 1160).

Before judgment is rendered against a defendant constructively summoned, an attorney must be appointed at least thirty days before judgment and his duty is to inform the defendant of the action pending against him; he is appointed by the Clerk when the warning order is made, and a bond must also be executed to protect the defendant in the case the judgment should be set aside, and the property restored (Section 6261).

Where property of a non-resident is attached a warning order must be issued either on the return of the Sheriff, or the affidavit of the plaintiff (Section 494).

Before a lien against real estate owned by a non-resident for a mechanic or material man can be enforced a similar warning order must be obtained (Section 6929).

Owing to Constitutional provisions in Arkansas forbidding counties or municipalities to issue interest-bearing evidence of indebtedness, all public improvements are constructed through improvement districts. Through these improvement districts all the public improvements of the State since the adoption of the Constitution in 1874 have been constructed.

The general laws on this subject relating to the principal improvements of the State may be classified as follows:

(1) Improvement districts in cities and towns. Under these, water works, sewers, street paving, city parks and many other city improvements are constructed.

(2) Levee districts.

(3) Drainage districts.

(4) Road districts.

These improvement district proceedings are generally based on obtaining the consent of the majority in value of the owners of the property to be assessed, in fact the Constitution prohibits the General Assembly from authorizing assessment on real property for local improvements in towns and cities unless based upon the consent of the majority in value of the property holders owning property adjoining the locality to be affected (Art. 19, Sec. 27).

The General Assembly may create improvement districts outside of cities and towns without the consent of the prop-

erty owners, but the general laws on the subject of creating improvement districts for the public improvements, such as levees, drainage, and highways, are bottomed on obtaining the consent of the landowners in some way or another as a prerequisite to the formation of the district, or rather to the district functioning.

Improvement Districts in Cities and Towns

These begin by a petition of property owners upon which an ordinance is passed (Section 5649). Then three months are allowed to obtain a petition signed by a majority of the property owners, and then thirty days' notice allowed for suit to review the action of the Council as to whether a majority signed (Section 5652). Then Assessors are appointed and they make the assessment of benefits and give ten days' notice of a hearing before the Board, with the right to appeal from the Board of Assessors to the Council within ten days (Sections 5660, 5665).

After the Council has approved the assessment an ordinance is passed, which must be published, and the property owners have thirty days after such publication for the purpose of bringing suit to correct or invalidate such assessment (Section 5668).

In considering the right of the property owners under this Section the Supreme Court, in Jacobs vs. City of Paris, 131 Ark., 28, said:

"In view of the limited areas of local improvement districts within towns and cities it could hardly be said that thirty days is so short a time that it practically denies property owners the right to be heard. The time, though short, we believe was sufficient to enable property owners who are affected by the improvement to appear and to be heard, and thus their constitutional right of due process is preserved."

Levee Districts

County Courts may create levee districts upon application filed and notices posted for ten days of the application (Sections 6811-6814). After it is formed the Court shall fix a day of election for three directors and three assessors and shall appoint judges of election to hold the election, at which election the landowners of the district shall vote, and their

vote determines the election of these officers (Sections 6816, 6818).

After the directors are elected they shall make an accurate survey of the work to be done and estimates of the costs made by the engineer, and the exact location; then the assessores shall assess the value of the lands subject to overflow and benefited by the work, and assess the benefits to it by the improvement. After that is done then the Board shall cause a meeting of the landowners of the District after at least five days' notice of the time and place of the meeting. The estimates of the surveyor and list of the assessments are submitted to the meeting (Section 6825).

If a majority of the landowners, either present in person or by proxy, shall vote in favor of the work, it shall be the duty of the Board to cause same to be constructed in accordance with the reports and estimates (Section 6826).

Then the assessors are to make an assessment and the assessors and the Board shall review it and notice of the time and place of such review shall be given for ten days, at which any person may appear and have his complaint heard and considered by the Board. After this hearing then the Board shall file the assessments in the Clerk's office and this becomes the assessment against the property (Section 6830).

After these assessments are thus made, then there is a proceeding for their collection if not paid within thirty days. A suit is to be brought wherein the landowners are made defendants and the list of lands set out, and if the defendants are non-residents, then four weeks' publication is required (Section 6836).

In construing these statutes in Overstreet vs. Levee District, 80 Ark. 462, in an exhaustive opinion by the present Chief Justice, the Court treated these proceedings as prima facie only, and the opinion clearly shows that all defenses to the merits of the assessment may be heard in this suit, the effect of these assessments being merely to throw the burden of proof upon the landowner attacking them.

In this decision the Court was but following, on this point, Carson vs. St. Francis Levee District, 59 Ark. on p. 536, where it is said that in the foreclosure suit there is full opportunity for hearing any complaints against the assessment in the foreclosure under an Act similar to the general law.

Drainage Districts

Drainage districts may be formed by the County Court of any county upon a petition which must give in detail the ditches and laterals to be constructed and the petitioner shall give bond to pay the costs if the prayer of the petition is not granted. Then the County Court, in regular session, or a called session, shall appoint three free-holders as viewers and an engineer, and they shall proceed to make a preliminary survey of the proposed ditch and shall report to the Court at the time fixed by it, if no time is fixed at the next regular term, and the report must be entered of record (Sections 3569, 3571). At the time of the appointment of the viewers the Court must cause a notice of the pendency of the petition and the appointment of the viewers, the place of beginning, route and terminus of the proposed ditch, and the time fixed by the Court when the viewers shall make their report, which shall be given publication by one insertion in some newspaper of general circulation in the county (Section 3572).

Remonstrance may be filed at the time of the hearing of the report of the viewers (Section 3574). If the Court finds in favor of the improvement, then the Court shall direct an engineer to survey the ground and set a stake at every 100 feet of the proposed ditch and make a report of the same.

The viewers shall also make and return a schedule of lands to be benefited, or damaged, by the improvement, the damage or benefit to each tract, and make separate estimates of the cost of location and construction, and apportion the same to each in proportion to the benefits or damages which will result to each. This report must be filed with the Clerk; after that is filed the Clerk shall set a hearing for some date at the next regular term of the County Court (County Courts are held quarterly). The Clerk shall set some day for hearing and shall cause notice of the filing of the report to be published in the county, stating the date of the hearing and describing the lands to be affected. This notice must be published for two weeks and the last shall be at least fifteen days before the date fixed for the hearing (Section 3577). This necessarily gives three months from filing assessment in Court until the hearing, and, at a minimum, twenty-nine days' notice.

Road Improvement Districts

These districts are formed by a petition of the majority in land value, acreage or number of landowners within a proposed road improvement district, petitioning the County Court to establish it. Then public notice is given through a newspaper by three consecutive insertions (which the Court holds means three weekly insertions) that the petition has been filed and giving a description of the territory embraced in the petition, and calling upon persons owning land in the district to appear before the County Court on some date to be fixed by the Court, not less than five days after the last insertion of the notice, to show cause for or against the establishment of the district (Section 5399).

The County Court then has a public hearing as to whether the district shall be created and can only do so where it is shown the petition was signed either by a majority in land value, acreage, or number, and the County Court deems it to the best interest of the county and the land owners, then it shall establish the district (Section 5401).

The land owners have a right to appeal from this order within thirty days (Section 5403).

After the district has been formed and the plans adopted, then comes the assessment of benefits; this is done by a Board of Assessors, and after they have finished their work they shall certify the assessment to the Board of Commissioners and the Commissioners shall file the same with the County Clerk, and the Clerk shall give two weekly notices and said notice shall give a description of all lands embraced in said district, and state that the assessment of benefits has been filed in his office and call upon any person aggrieved by reason of the assessment to appear before the County Court on some date to be fixed, not less than five days after the last insertion (Sections 5419-5423).

Appeal may be taken against assessments within ten days.

Thus there is three weeks' notice (plus five days) to start with, and a petition signed by a majority of land owners affected, and the two weeks (plus five days) of hearing of the assessments, and said notice describes the lands affected specifically.

Foreclosing Assessment Liens

There is another class of constructive notice, and that is,

of the collection of the assessments that have been levied. The assessments in these improvement districts are liens upon the property and when they are not paid the lien of the district is foreclosed through a proceeding in the Chancery Court. While there are differences in details in these various districts, such proceedings are substantially the same. The St. Francis Levee District is composed of eight counties in eastern Arkansas and was the first large constructive work in the State to protect the lands of the Mississippi Valley from the overflows of that and other rivers flowing through it. The validity of this district was sustained in Carson vs. St. Francis Levee District, 59 Ark., 513; the decision is a landmark in our jurisprudence and in the development of the State.

The Court sustained the delegation of the taxing power to these districts and the formation of them and held that the provisions for the assessment complied with the due process requirements of the Fourteenth Amendment, particularly as all complaints against assessments could be heard in the foreclosure suit.

One of these foreclosure suits was before the Supreme Court of Arkansas in Ballard vs. Hunter, 74 Ark., 174. The Act provided that the notice of the pendency of the action should be given to non-resident owners by publication in a newspaper published in the county for four weeks prior to the date of the term of Court on which final judgment may be entered for the sale of the lands.

The Court held that the law, of which the landowners were bound to take notice, advised them that their lands in the levee district are subject to taxation for levee purposes and of the times and places, when and where they will be assessed and taxes levied thereon ,and when, if not paid, suits will be instituted in certain Courts to enforce the collection thereof by sale; and that notice of the pendency of the suit will be given them by publication in a newspaper published in the county where the lands lie.

This case was determined in 1905—twelve years after the law was passed creating this district, and providing for these taxes; and therefore the Court properly held that the landowners would be advised by the law that their lands were subject to taxation for levee purposes, and the time and place, where and when, they would be assessed and the taxes

levied, and when due, etc. This was the gist of the decision sustaining this constructive notice for the reasons stated.

This case was carried to the Supreme Court of the United States and is found reported in Ballard vs. Hunter, 204 U. S., 241, the opinion being written by Mr. Justice McKenna.

The Court fully reviewed the statutes of the State under which these proceedings were had, and the Court stated:

"It should be kept in mind that the laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in Huling vs. Kaw Valley R. & Improvement Co., 130 U. S. 559, 32 L. Ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the 'duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition: and, if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.'"

Chief Justice White, delivering the opinion of this Court in American Land Co. vs. Zeiss, 219 U. S., 47, quoted at length from Mr. Justice McKenna's opinion in Ballard vs. Hunter, including the excerpt just given.

In Roller vs. Holly, 176 U. S., 398, this Court reviewed the statutes of the United States and of the various States as to provisions for constructive notice. The Court stated that there was little judicial authority upon the question, and that the statutes of the several States regulating proceedings against absent and non-resident defendants are entitled to great weight in passing upon the question of the reasonableness of the notice (page 410). Therefore in considering constructive notice in Arkansas the statutes of the

State on this subject are entitled to great weight in determining the reasonableness of it, and for that reason they have been set out herein.

It will be noted from a resume thereof that thirty days' notice and four weeks' publication is the general rule, coupled with the requirement of the appointment of an attorney for the non-resident who shall notify him of the pendency of the proceedings and the nature thereof. In the proceeding for creating benefit assessments a lien upon real estate, generally speaking there is at least thirty days' notice to be given to the property owner, but in various statutes, as shown in the resume, a shorter time is given, but in every instance where a shorter time is given it is a subsequent step in the proceeding following several other notices that have been given to the property owners all looking to the creation of the district and the fixation of a lien upon the property, which notices are well calculated to bring information home to all landowners in the district, whether resident or non-resident. What is more important even than the notice is the requirement that the consent of the majority of the property owners shall be obtained, which requirement and the efforts to obtain it, bring home to the property owners to be affected information more effectual than the publication of notice in the newspapers themselves. This fact has been considered by the Court in considering what length of time constitutes due process.

In Stiewel vs. Fencing Dist. No. 6 of Johnson Co., 71 Ark. 17, discussing a 20-day limitation therein, the Court said:

"We are aware that twenty days is an exceedingly short statute of limitations. But it is important that improvements of this kind, once begun, should be completed as speedily as possible. To this end it is necessary that all questions concerning the legality of the formation of the district and the validity of the assessment should be settled as soon as practicable. Such improvements, that require a majority in value of the property owners living in the district to set them in motion, are likely to be generally discussed and, therefore, it is not probable that people interested will be taken unawares. So, considering the nature of the improvement and the steps to be taken to initiate and complete it, we are not willing to say that twenty days is an unreasonable time."

Under this Act passed through the Legislature "under-

alded, unhonored and unsung," no consent of the property owners was obtained; in fact, was precluded by an emergency clause; no steps were taken locally to put it in motion. It was a self-starter.

TWO WEEKS NOTICE UNDER THIS SPECIAL ACT IS NOT DUE PROCESS OF LAW

The admitted facts are these: Mrs. House lived in Washington, D. C., for eleven years prior to the filing of the complaint (R. p. 3). She had no information whatever of the passage of Act 245 by the General Assembly until long after proceedings had fixed a lien on her property. This Act was passed by the General Assembly in 1919 and was local and special, and no notice of the intention to apply therefor was published in the locality where the lands to be affected were situated thirty days prior thereto as required by the Constitution of Arkansas in such cases.

The plaintiff does not make this allegation as avering the Act is void on account of this non-compliance, but it is a material circumstance on the subject of notice.

There was a general law in effect under which the road district could have been created, under which the notice would have been longer and the proceedings more likely to have been communicated to her, and special acts are prohibited where a general law is applicable under the Constitution of Arkansas. This provision is not invoked as defeating the Act of itself, but is material in the reasonableness of the notice (R. p. 5). The Act was not printed and distributed and given general circulation until long after the lien was created against her property and the only source of information existing as to said Act was an examination of Acts passed by the General Assembly, in the office of the Secretary of State (R. p. 8).

The notice is dated June 17; official publications were June 18th and June 25th, notifying the landowners of a hearing on July 7th and to file their objections in writing on or before July 6th (R. p. 6). Excluding one of the days, which is the rule in Arkansas in computing time, seventeen days were left, or, at best, eighteen clear days.

In Ballard vs. Hunter, 74 Ark., 174 (which was affirmed in 204 U. S., 241), in sustaining four weeks' publication of

constructive notice the Court stressed the fact that the law of which property owners were bound to take notice advises them that their lands within the levee district are subject to taxation for levee purposes and of the time and place and when and where they would be assessed and taxes levied thereon.

In Goodrich vs. Ferris, 214 U. S., 71, there was a question before the Court of due process in the administration of an estate and a particular matter there involved was but an incident of the proceeding prescribed by the laws of California in respect to the administration of an estate in the custody of the Probate Court.

Under those circumstances the Court held that much shorter notice would be due process than if it were an original process attempting in the first instance to bring parties before the Court.

In Bellingham Bay & B. C. R. Co. vs. City of New Whatcom, 172 U. S. 314, the same principle was invoked. In that case there was a reassessment of property for a local improvement and it was admitted that the notice of re-assessment was necesary, but the notice in that case was attacked as not being sufficient (a 10-day notice) to constitute due process.

The Court said the purpose of the notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax, or some part thereof.

The Court called attention to the fact that it was published in three successive issues of the official paper of the city, and that a re-assessment implies not merely the fact of the improvement, but also that one attempt has been made to collect the cost and it had failed.

Moreover, it was shown that there could have been no hardship, that though the plaintiff corporation was a non-resident it was doing business in the State of Washington, having its principal office in the City of New Whatcom, domiciled where the improvement was situated and the improvement consisted in grading, planking and sidewalking where its offices were situated, and the Court held it must have known of such improvement and that it was to be paid for, and that the only method of payment under the law of the state was by local assessment of the property benefited.

It was also shown that in litigation over the previous

assessment, while the plaintiff was not a party to it, yet had assisted in paying the costs of that litigation.

Under these facts ten days' notice was held not unreasonably short to present objections to the re-assessment. The facts here present a radically different situation. There was no pre-existing law; there was no visible improvement going on; this was not a re-assessment, but an original assessment; there was no notoriety of the work as in that case, for in this case the work only existed in blue prints at the time the assessment was made.

In American Land Co. vs. Zeiss, 219 U. S., 47, the Court quoted at length from Ballard vs. Hunter, 204 U. S., 241, as formulating the principles governing constructive notice, which would be good as against non-residents, and stated:

"We think the statute manifested the careful purpose of the Legislature to provide every reasonable safeguard for the protection and rights of unknown claimants and to give such notice as, under the circumstances, would be reasonably likely to bring the facts of the pendency and the purpose of the proceeding to the attention of those interested."

This statute manifestly fails to provide reasonable safeguards which were found in the statute there and in the one considered in Ballard vs. Hunter. There were only two weeks publication; no attorney for the non-resident; no description of the property; no listing of the delinquent landowners; no description of the district itself; no notice posted upon the property; no notice left with the custodian of the property, and a failure to proceed according to the ordinary processes which were in force in Arkansas to bring non-resident defendants before the Courts.

In considering the notice necessary to charge a landowner with special assessment against his property this Court, in Londonerer vs. City and County of Denver, 210 U. S., 313, stated that due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the taxpayers shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by law fixing the time and place of the hearing (P. 385).

In this case there was no personal notice; there was no law fixing the time and place for the hearing, and the only notice was that of the two weeks publication, not exceeding

eighteen days' time in which the taxpayer could be heard before the lien was irrevocably fixed.

We attach much importance to the fact that in considering the reasonableness of the notice that the Court should consider the fact that there was no pre-existing law concerning which all property owners must take cognizance. While this law was valid under the decisions of Arkansas, notwithstanding it was passed contrary to the provisions of the Arkansas Constitution, in failing to give the thirty days' notice in the community to be affected of the introduction of the special bill, and an emergency clause cutting off the right of referendum, certainly property owners would not have such opportunity to become acquainted with the law and its terms as if it were a pre-existing law, or if its objects and intent had been published in the commuunity for thirty days before introduction in the Legislature, or if its functioning depended on a vote of the people or the property owners. It is right for the Court to consider these questions, just as it did in the Bellingham Bay case, where it considered the facts that the improvement was right at the door of the complaining taxpayer and that it was a re-assessment, and that the taxpayer had more or less knowledge of the previous assessment which had been invalidated, and of the pre-existing law prescribing methods of payment for such improvements.

We invite your attention to the reasoning of the majority opinion and its answer thereto in the dissenting opinion.

The argument was made before the Supreme Court of Arkansas, as it is made here, that there were only eighteen days' clear notice, and that that was insufficient where the parties were not already in court, as an original proceeding where there had been no pre-existing law fixing these taxes, or other notice of the existence of the district; and the majority, while conceding there is only eighteen days' notice, holds it is sufficient for these reasons:

In the first place the Court refused to consider the allegations of the complaint admitted by demurrer that no notice was given of this special bill as required by the Constitution.

The view of the Court, as we understand the opinion, is that because the lack of that notice was not a ground of avoiding the Act, that allegation of it could not be consid-

ered for any purpose (R. pp. 32-33). We expressly pleaded these facts only as a matter to be considered as material on considering the reasonableness of the notice given. Our contention is that from the lack of giving this notice there was less probability of notice reaching the property owners than if it had been given. Even if the majority of the opinion is right that the Court could not consider the allegations, yet the opinion of the minority shows that the records of the Legislature themselves show that these notices were not given (R. p. 38), and the Court takes cognizance of these records.

Next, the majority opinion asserts that the fact that the appellant lived in Washington, D. C., and knew nothing of the assessment of her land until she applied for a statement of the taxes due thereon in 1920, to have been due to a failure to keep in touch with the progress of affairs in the state. Then the Court says that it was a matter of the greatest notoriety that at the 1919 session of the General Assembly a road-building program was launched of such tremendous proportions as to attract very general attention; and that it was commented upon everywhere; that while the widest difference of opinion existed as to its wisdom, everyone at all familiar with the history of the State had knowledge of the existence of a road-building program throughout the State (R. p. 33).

The minority of the Court said:

"As a sort of make-weight argument the majority opinion says that the current history of the State shows that there had been a vast propaganda in the interest of good roads which resulted in the Special Road Acts passed by the Legislature of 1919.

"We have not read the history of the times through the same glasses. According to our view there had been no public discussion looking towards the adoption of a system of constructing good roads throughout the State. Reckless and extravagant statements as to the cost of the roads and of the amount of Federal aid which would be received, which were calculated to lull the landowners into non-action, were spread abroad after the passage of the Special Road Acts.

"Not only was there no provision for giving the landowners a voice in the necessity or expediency of passing the Acts imposing the whole cost of constructing the improved

roads upon the landowners, but in order to prevent a referendum to the qualified electors, the last section provides that the Act, being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared, and it shall take effect at once. The Court records will show that many of these Special Acts were prepared by attorneys representing special interests; and if current history is the criterion, practically all of them were prepared by such attorneys, and protesting landowners were given no voice in the matter, although each Act called for a bond issue of twenty-five or thirty years duration."

If the history of the times is to be considered a factor in determining the reasonableness of this notice, the Governor should be a competent witness upon it.

Governor McRae made an address before the Sixteenth Annual Convention of the Arkansas Utilities Association in session at Pine Bluff and, referring to the work of a recent extra session of the Legislature which provided for road building hereafter to be from motor vehicle and gasoline taxes, instead of local assessments, made this statement:

"At the extra session of the Legislature one of the finest pieces of road legislation ever enacted was passed, considering the conditions which existed. It was the worst turmoil which the State has known and the worst tangled road problem ever handed to the governor of a State. There was some $60,000,000 in bonds issued and about $40,000,000 authorized for a system of roads, laid out in a kind of crazy-quilt fashion, no two of which connected up with the other. * * *"

"We are going to build our roads on the tax from gasoline and that derived from vehicles."

Therefore we have this situation: The majority Judges say that this propaganda for good roads was in existence prior to the session of the Legislature, and everyone conversant with current history should have known there was a great road-building program on hand at that time, and should have taken notice of these assessments to be imposed, whereas the minority Judges say that there was no previous public discussion looking toward the adoption of a system of constructing good roads throughout the State, and the reckless and extravagant statements as to costs made after the passage of these Special Acts had lulled the landowners into non-action, and that the referendum was

cut out of these Special Acts to prevent the landowners having a voice in the necessity or expediency of imposing the cost of construction of improved roads upon them; and this view of it accentuated by a statement from the Governor that this system of roads built up by these Special Acts was a kind of crazy quilt--no two of which were connected up with the other.

It is respectfully submitted that no propaganda in favor of good roads is sufficient to supply lack of definite notice and for it to be given for the time ordinarily given in Arkansas for constructive service. This is giving a dignity to propaganda it has not heretofore enjoyed.

Another fallacy, as we view it, in the majority opinion for saving the eighteen days' notice is that the majority opinion tacked on to that eighteen days the ten days which is allowed to bring suit after the Commissioners have passed upon the assessment.

The Court stated that this gave twenty-eight days, and under these circumstances, assuming that there was great notoriety to these Acts, which should reach all landowners, that twenty-eight days would therefore be due process. But this ten days cannot be tacked on to the notice which was given. It is true that the property owner had these ten days to file suit in the Chancery Court, if he had known actually or constructively of the hearing before the Commissioners, but the real question is whether the notice for hearing before the Commissioners is sufficient.

The minority opinion agrees that a four-weeks consecutive publication as described in the St. Francis Levee District Act as construed in Ballard vs. Hunter, 74 Ark., 174, is fair and reasonable, but did not think the ten days allowed the landowner to file his complaint in Chancery should be counted, for two reasons which the Judges set forth fully at page 38, which we submit to the Court are unanswerable.

Moreover this Court has expressly determined that exact question in Roller vs. Holly, 176 U. S., 398. This was a case arising under the laws of Texas, and the summons was returnable on January 5th, but under the Texas Practice Act default could not be taken until the 5th day of the term, which was January 9th, and it was contended that notwithstanding the notice read for appearance on January 5th, that as under the law the defendant had until the 9th to appear,

that those additional days should be reckoned in determining the length of the notice, but this Court answered:

"But, as a citizen of Virginia, he was not bound to know the practice of the Texas Courts in that particular, and was at liberty, even if he was not compelled, to construe the notice as it read upon its face."

We call your attention to the language of this notice, which is set forth at page 1 of the record, which expressly names the 7th day of July as the time, the First National Bank of Morrilton as the place, for the purpose of hearing any complaint upon any of the assessments and that any complaint of an assessment must be filed with the Secretary of said Commission in writing before the date of said hearing. The landowner was at liberty, even if he was not compelled, to construe the notice as it read upon its face.

There is nothing in this notice to show that there was another ten days which the landowner might have to bring a suit in Chancery Court; the notice did not mention that, and there was no pre-existing law giving that right. Therefore, the majority of the Court was clearly in error in tacking this ten days onto the eighteen days, and making it twenty-eight days of constructive notice, and it was only through tacking it on and making twenty-eight days that the majority, if we understand correctly their opinion, sustained this notice. This exact question of two weeks notice for local assessments under these Special Acts was before the Circuit Court of Appeals of the Eighth Circuit and it was held insufficient under the due process clause.

Thornton vs. Road Improvement District No. 1 of Clark County, Arkansas, 291 Fed., 518, was determined before Circuit Judges Sanborn and Kenyon and District Judge Symes: the opinion was written by Judge Sanborn.

A road district was created in Clark County under the general road Act known as the Alexander Law, being Act 338 of 1915 and found in Crawford & Moses' Digest, Sections 5399 and 5488. The Legislature of 1919 passed Act 374, which added a strip of land aggregating 95,000 acres to the District which would be benefited by the Nix Ferry Road, and the Commissioners directed the assessors to assess benefits therein.

This Special Act provided in Section 8 (Vol. 2 of Road District Acts of 1919, page 1659) that the assessments so

made should be filed with the County Clerk and notice of its filing given in accordance with Public Act 338; this was Section 13 of said Act, which is Section 5423 of Crawford & Moses' Digest.

The notice provided in this Section is practically the same as the one provided in the Special Act now under consideration; it provided for two consecutive insertions in a publication having general circulation in the county, (the Court had theretofore construed such language as meaning two weekly insertions).

This notice differed from this only in two particulars; one that the last publication should be not less than five days after the last insertion, whereas the one here provides for ten days, but the notice under the Alexander Law required a description of all lands embraced in the District to be set out in the notice, whereas in the notice in this case such description is conspicuous by its absence.

The Alexander Law further provided that any owner of real property might appeal from the judgment of the assessment within ten days by filing an affidavit for appeal, whereas the Act now under consideration provided a ten-day period in which to file a bill in Chancery, setting up a complaint against the assessment.

The plaintiffs in that suit were non-residents of Arkansas, and had no knowledge until five months afterward of the proceedings against their property.

Therefore, Thorntons, the plaintiffs in that case, did not appear and file their objections to the assessment against their property under the two-weeks' notice provided for, nor appeal in the ten days thereafter. The defense was made there, as it is here, that the plaintiffs were estopped from maintaining an original suit for relief from an excessive and discriminatory assessment, because their land was adjudged benefited by the County Court and the amount specified in the report of the Commissioners after notice of hearing upon the question had been published as directed by the statute, and the formal proceedings for the assessment and taxation conformed to the provisions of those statutes, as the action was not brought within the ten days specified. They cited many cases of this Court in support of their contention, and Judge Sanborn cited the cases and stated the Court had considered each of them. Judge Sanborn stated:

"But the plaintiffs were residents and citizens of Illinois The legal proceedings pursuant to the statutes of Arkansas for the assessment and the publication of the notice of the hearing thereon, the judgment of confirmation thereof, and the expiration of the time to appeal therefrom, occupied less than two months. The plaintiffs had no actual notice of any of these proceedings until more than five months after their time to appeal had expired. The only notice of the hearing required to be given was the publication of a notice thereof twice in a newspaper published in Clark County, Arkansas, and the question is: Were these citizens of the United States estopped from all relief by an original suit in a Federal Court from this discriminatory and excessive assessment and taxation because the proceedings therefor were in accord with the statutes of Arkansas? The question is not entirely novel."

Then the Court quoted the Fourteenth Amendment and referred to Norwood vs. Baker, 172 U. S. 269; Myles Salt Co. vs. Iberia Drainage District, 239 U. S., 478; Gast Realty Co. vs. Schneider Granite Co., 240 U. S., 55, and decisions of the Circuit Court of Appeals.

On the reasoning of those cases the Court reached the conclusion the plaintiffs were not estopped by the regularity of the proceedings in making the assessment for taxation by the Assessors and Commissioners of the Road District and the County Court, from maintaining an original suit in the Federal Court for just and equitable relief against violation of the Fourteenth Amendment committed and threatened by the enforcement of the discriminatory and arbitrary assessment of benefits of which they complained. In that case the plaintiffs were citizens of the State of Illinois and had a right to bring their suit in the Federal Court on the ground of diversity of citizenship, whereas in this case Mrs. House was a resident of the District of Columbia and could not maintain such suit upon that ground. There can be no difference in principle between an original suit brought in a State Court of concurrent jurisdiction, with one brought in the Federal Court asserting the same rights under the Constitution of the United States.

In this connection we ask the Court to read the dissenting opinion of Mr. Justice Hart, concurred in by Mr. Justice Wood, on this subject, found at page 37 of the record.

THE NOTICE ON ITS FACE IS INSUFFICIENT

We again ask the Court to read the notice, found at page 1. It is headed: "Notice of the Assessment of Benefits in Road Improvement District No. 2, Conway County, Arkansas." The title of the District is again mentioned in the body of it. It gives notice that the assessments have been completed and are on file with the Secretary of the Commission, whose name is not mentioned, and a copy filed with the County Clerk and open to inspection, and that there will be a hearing on July 7th, at First National Bank of Morrilton. There is no mention of the Act under which the District is created; there is no clue given in the notice whereby the boundaries of the District could be ascertained, other than by the reference to its official title.

There is no description of the land assessed. There is no listing of the names of the owners of the land. Some of the Arkansas statutes on this subject require the amount of the assessments to be published as well as the list of the land, and others requiring description of the land.

Assuming, for the sake of the argument, that the time of the notice was sufficient, if the notice on its face was not sufficient to inform property owners that their property was involved it would be insufficient.

Mr. Justice Brewer, speaking for this Court in Bellingham Bay & B. C. R. Co. vs. New Whatcom, 172 U. S., 314, stated that the purpose of the notice is to secure the owner an opportunity to protect his property from the lien of the proposed tax or some part thereof.

"In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard."

In Jacobs vs. Roberts, 223 U. S., 261, this Court said in regard to substituted service that it "Must be of such character that it will be reasonably probable that the parties whose property is placed in jeopardy will be apprised of the pendency of the action and will be afforded an opportunity to appear and make defense."

In Fenton vs. Minn. Title Insur. & Trust Co., 15 N. Dak., 365 (s. c.), 125 American State Reports 599, the Court reviewed this subject fully; and first called attention to the fact that the Legislative discretion as to form of notice was not unlimited, but was controlled and restricted by the provisions of the Fourteenth Amendment, and the fact that a notice is in the form of a statute and has been served as prescribed by the statute is not a conclusive test of its sufficiency, and cited many cases to sustain this proposition, and then laid down this principle:

"There can be no doubt as to the right of the Legislature to provide for some other method of giving notice to interested parties of the pendency of an action than by personal service of the summons where the action involves property within the territorial jurisdiction of the Court, and where personal service of the summons is for any reason impracticable. Notice by publication in such cases has always been held sufficient. There must, however, be notice of some kind, and it must be a notice of such a character that it will have a tendency, in a reasonable degree, to convey information to interested parties that the action affects their rights. A notice such as the published summons in this case, which neither names the adverse claimants to the land in controversy nor describes the land itself, is clearly neither appropriate nor reasonable. It conveys no information whatsoever that the action involved the title to the land of these appellants, or that these appellants were in any way interested in the action. The publication of such a summons, containing no description of the property or persons affected, is, so far as the adverse claimants are concerned, no notice at all. As to such persons it possesses none of the essential attributes of a notice such as is required by 'due process.' "

Cases bearing upon this subject and a statement of the principle is found in 12 Corpus Juris, 1262. Applying the principles to the facts here: Certainly this notice is not so full and clear as to disclose to persons of ordinary intelligence who may be owning land in Conway County, or are living in Conway County, that their land is included in District No. 2 and affected by the proceedings of which this notice is given. It lacks all of those elements which usually and properly appear in notices to non-resident defendants. Neither their names, nor their land, nor its locality is mentioned, the nature of the charge, the amount of it is not given. Surely such notice on its face is not sufficient to

sustain a lien against real estate for $19,000.00 on two publications in a county paper.

LIMITATION NOT APPLICABLE TO THE MISTAKE

Whatever may be said of the limitation prescribed in the Act for bringing complaint against the assessments, first before the Board of Commissioners and, second, in the Chancery Court within ten days thereafter, certainly this provision of the statute cannot be applicable to the erroneous basis of the assessment adopted by the Commissioners under the mistaken belief that the assessment of $43,000.00 was the current assessment when the Commissioners admitted had they known of the reduction to $30,000.00 they would have based their assessment upon the latter valuation.

There is no distinction in principle between a fraud and a mistake tolling the statute of limitation.

Mrs. House did not know of this mistake, in fact knew nothing of the existence of the District, but had been diligent in getting her county assessment reduced to a proper level, owing to the sale of the timber reducing the value of her lands. The Commissioners did not know of this reduction and the consequent lowering of the value of her property and mistakenly assumed it was on the same level as in 1917. Had they done this fraudulently there is no question but under the decisions in Exploration Co. vs. U. S., 247 U. S. 435, and Diamond Coal & Coke Co., 255 U. S. 323, the limitation prescribed in the Act would not have applied.

Where mistakes have been made in surveys of public lands the same principle has been applied as in the fraud cases. Northern Pac. Ry. Co. vs. U. S., 227 U. S. 335, and Wilson vs. U. S., 245 U. S. 24.

Pomeroy Equity Jurisprudence (3rd Ed., Section 852), states that all possible forms of mistakes are relieved against in equity, provided the mistake is not the result of the mistaken party violating some duty and provided that no adequate remedy can be had at law.

In this case it was not the plaintiff's mistake—it was the mistake of the District, and surely every principle of equity estops the District from pleading limitation, which, if suc-

cessful, operates as an admitted wrong, if not fraud, upon her rights, resulting in the confiscation of her property.

THE ASSESSMENTS ARE VOID BECAUSE ARBITRARY, DISCRIMINATORY AND CONFISCATORY

The demurrer admits that the assessments as made are arbitrary, and that they are based on a zone system; which applies benefits upon a given percentage of the county assessment according to the zone into which the land is classed; and that they are grossly discriminatory, both in the county assessments used as the basis, and in the benefit assessments, in that similar adjacent lands of greater value are assessed both for the county asesssment and the benefit assessment at less than the appellant's lands, and further, that mistakenly the benefit assessments are based on a valuation for county purposes of a $43,000.00 county assessment instead of a $30,000.00 county assessment, and had the Commissioners known of this fact they would have based the benefit assessment on the $30,000.00 county assessment, instead of the $43,000.00 assessment (R. pp. 2, 3).

The demurrer further admits that the assessments as levied are confiscatory in that the lands are not enhanced in value to the extent of the assessments levied. (In the companion case against Road District No. 5 submitted with this one it is further admitted that there was no benefit whatever from the improvement.) To these valid defenses the Supreme Court of Arkansas says that they cannot be considered because a complaint in equity was not filed within ten days after the assessments were made final (see opinion of majority, R. pp. 34, 35).

The Court cites the recent Arkansas cases holding that the procedure under the Special Act is an exclusive remedy for all defenses which the landowner may have against assessments, including the defense that the assessments are void as confiscatory. The Court does admit that if the invalidity of the assessment appears on the face of the proceedings that it may be attacked collaterally, and these defenses sustained (R. p. 35), and that the limitation in the Act is not a bar to such defenses.

The dissenting opinion demonstrates that prior to these road district decisions cited in the majority opinion that the

Supreme Court of Arkansas had a different opinion on due process of law than is now expressed therein. While not admitting the opinion of the majority of the Court is sound, yet for the moment we ask that this question be considered from the standpoint of the majority opinion, and test the assessments on the face of the proceeding, and even with that severe test they must fail. The complaint alleged that the Commissioners accepted as the basis the 1917 county assessment and attached to it the percentage of benefits according to the location of the land, dividing the District into three zones, creating Zone No. 1 of land within one mile of the road and assessed at 50% of the 1917 county assessment, and Zone 2 all land over a mile and less than two miles and assessed at 40% of the county assessment, and Zone 3 the balance of the District, assessed at 30%, making certain exceptions not pertinent to this subject (R. p. 9).

The stipulation shows that the facts regarding this assessment were fully developed in the trial court and considered by the Court as explanatory of the pleadings (R. p. 2). In this explanatory evidence it was shown that the Commissioners accepted as the basis of their benefit assessments the 1917 county assessment of the lands in the District, and that it had been approved by the County Board of Equalization. The Commissioners assumed it was correct and made no personal inspection of Mrs. House' land. They divided the District into three zones and assessed all property in Zone 1 at 50% of the 1917 assessment, and land in Zone 2 at 40%, and Zone 3 at 30%.

Generally speaking, Zone 1 was land within one mile of the road; Zone 2 was land within 2 miles; Zone 3 was the balance of the District, with these exceptions: If land in Zone 1 was in another road district it was placed in Zone 2, irrespective of distance from the improvement, and all land south of the road extending to the river, irrespective of distance, placed in Zone 1, except so much as was in another road district. This rule was applied to Mrs. House' land, but not exactly. She had 920 acres included in District No. 5 and it was assessed at 33⅓%, except two tracts at 50%. The rest of her land was assessed at 50%, although much of it was more than two miles from the road. All of it was between the improved road and the river and on account of

said location was classed as Zone 1, irrespective of distance from the road.

That at the time said assessments were made and filed, but before the hearing on July 7, 1919, the County Assessor and the Township Board of Assessors, the then assessing officials of the county, reduced Mrs. House' county assessments on the lands included in this District from $43,030.00 to $30,323.00. This fact was not known to the Commissioners until long thereafter, and had it been known to them before this benefit assessment became final on July 7, 1919, they would have used it as the basis, instead of using the 1917 county assessment as the basis (R. pp. 2, 3).

We contend that the face of the proceedings shows the use of the 1917 county assessment and it shows that the District was divided into three zones and the benefits assessed by applying the lands situated in each of these zones a given percentage of the valuations on the 1917 county assessments. If we are correct in these assumptions, then even according to the test laid down by the majority of the Supreme Court in this case these assessments were void and the reasoning upon which they should be held void has been set forth clearly in two decisions of the Circuit Court of Apeals of the Eighth Circuit and in the dissenting opinion in this case.

In the case of Thomas, Sheriff, et al., vs. Kansas City Southern Ry. Co. et al., 277 Fed, 708, the Circuit Court of Appeals of the Eighth Circuit had before it the consideration of special assessments levied on a railroad company by a drainage district created under a Special Act of the Legislature. The case was heard before Judges Sanborn and Stone, Circuit Judges, and Trieber, District Judge, and it has added weight by the presence of Judge Trieber, who for many years had been the District Judge for the Eastern District of Arkansas.

The assessments were attacked in an independent action brought to enjoin the collection of the assessments, among other grounds on the charge that the assessments were arbitrary, unjust, illegal and void.

The Court quoted with approval from the decision of this Court in Kansas City Southern Ry. Co. vs. Road Improvement District, 256 U. S., 658, wherein this Court said that "Benefits from local improvements must be estimated upon contiguous property according to some standard which will

probably produce approximately correct general results." Then the Court added: "Such assessment cannot stand, if it is 'palpably arbitrary,' or if it is palpably discriminatory," citing many cases; and reached the conculsion that the test of law to be applied to the facts of the case is whether or not the facts show the assessment to be palpably arbitrary and discriminatory. The Court stated:

"The basis of valuation here employed for benefits is the valuation of all property within the District for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the Legislature here took them to be identical carries no more force than if some other basis of value had been selected."

Applying this principle to the facts here: The Commissioners have testified that they took the county valuation as a basis; they then assumed that it was correct and now admit that it was incorrect. It is admitted that it was discriminatory and excessive, and necessarily such discrimination and excessive taxation is reflected in their benefit assessments.

The demurrer admits the facts alleged in the complaint, which show the grossest and most discriminatory assessment for county purposes, and shows further that any application of even a correct assessment on the zone basis, irrespective of the physical situation of the property, is here radically wrong, as there are many hundred acres of the land covered by lakes, bayous and sloughs, and other hundred acres of fine, fertile land, yet benefits assessed on the basis of county assessments, and a percentage, irrespective of the physical condition, valuation, discrimination, or what-not, fixed as the benefit assessment. Hence under the reasoning of the Court, so strongly stated by Judge Stone in the opinion referred to, the assessments here made on a similar basis cannot stand.

In Mo. Pac. Ry. Co. vs. Road Improvement Dist. No. 1 of Hot Spring County, Arkansas, 288 Fed., 502, the Circuit Court of Appeals of the Eighth Circuit had before it a case dealing with assessments made in a road district created by a Special Act of the Legislature. The case was heard before Lewis, Circuit Judge, and Booth and Faris, District Judges, the opinion being written by Circuit Judge Lewis.

This was an assessment of railroad property, and the property within the district was divided into three zones, and the assessors took the county valuations as found in the county books and assessed the property according to a percentage of that county assessment, dependent upon the zone in which it was located.

The assessors in that case used the county assessment as the basis, just as the assessors in this case used the county assessment as a basis. The Court held that the basis was wrong and the assessment void. The theory was that special assesments on the basis of benefits rest upon the assumption that the property on which the assessments are made will be enhanced in value, and that the enhancement will fairly equal the assessment it is made to bear; but the Court held that adopting the county assessment was a different method from that authorized by the Act.

The District sought to sustain the assessment, notwithstanding this erroneous basis, because it alleged that the railroad was not injured thereby, as the farm lands were assessed benefits of 24% of their assessed value for general taxation, while the railroad was assessed not more than 6% to 12% of its assessed value. But the facts there showed that the railroad property was assessed 60% of its value for general taxation, while the farm lands in the district were, at the utmost, not assessed over 50% of their value, the weight of the testimony showing that they were assessed 15% to 25% of their value. Of this the Court said:

"On this it seems clear that the assessed valuation for general taxation could under no condition be considered a fair basis and safe guide for an equitable and just distribution of these special assessments. The basis used by the Commissioners was not only not permissible under the Act, it was also arbitrary, inequitable and grossly unjust."

Now the undisputed facts in this case are: Mrs. House' land had been, prior to the date that this assessment became

final, reduced for general taxation purposes from $43,000.00 to $30,000.00, and yet the percentage of assessments of benefits was based on the old assessment, which was not existing at the time this assessment became a lien against the property.

This makes a worse situation than was developed in this railroad case assessment, because it was a mistaken assessment to begin with, and the admitted allegations of the complaint show that it was highly discriminatory as compared with other property, aside from initial inherent error of being 30% higher than the actual assessment which the Commissioners mistakenly used, believing it to be the correct assessment.

Every reason given by the Court in this case is applicable here with double force, as the discrimination is so much more shocking here than in the railroad case considered by the Court of Appeals.

This also shows the inherent wrong of making zones and then basing the assesment in each zone on a given percentage of the county assessment, irrespective of the actual benefits received, a proposition so thoroughly shown to be unsound in the opinion of the dissenting Judges in this case.

Attention is called also to the fact that the railroad company obtained its remedy in an independent suit to enjoin the collection of the taxes, which had been levied, and it was not remitted to proceeding before the Board of Assessors, as provided in the Act; having shown an equitable cause of action, it was permitted to maintain the same, irrespective of those provisions of the Act itself for appearing within the time named in the Act or being forever barred from attacking a confiscatory assessment.

We have thus far considered the assessments upon their face, but we should not be confined to that limited consideration; and we contend that the Supreme Court of Arkansas erred in its later interpretation of the due process principle. Ordinary assessments for taxation may be made without a hearing and the due process clause is not applicable thereto, but when such an assessment is induced by fraud, demonstrable mistake, discrimination, non-uniformity, or the adoption of a fundamentally erroneous method, then the assessment is subject to an injunction in equity in an independent suit.

The Supreme Court of Arkansas stated this principle in

this language, in the case of Martineau vs. Clear Creek Oil & Gas Company, 141 Ark. 596, on page 600. To sustain this statement it referred to Green vs. L. & I. R. R. Co., 244 U. S. 499; Johnson vs. Wells Fargo Co., 239 U. S. 234. In the Green case referred to this Court held that the taxing by a uniform rule requires uniformity not only in the rate of taxation but also in the mode of assessment upon the taxable valuation, and that it makes no difference what basis of valuation is adopted provided it is applied to all alike.

In the companion case, Louisville & Nashville R. R. Co. vs. Green, 244 U. S. 522, this Court said that there was no showing of fraud, the contention being the Board had departed from the mode prescribed by the statute, and stated: "If they did this, or if they proceeded in disregard of rights secured to the taxpayer by the State or Federal Constitution, of course they proceeded upon erroneous principle."

The principles applicable here are so well stated in the dissenting opinion that we ask the Court to read it as sustaining our argument beginning at page 40 of the record. We especially call your attention to the review of the Arkansas cases showing that such assessments, up to the time of the line of decisions referred to in the majority opinion in these road district cases, would have been annulled in an independent suit as lacking in due process.

Justices Hart and Wood have made so clear the distinction between the application of the zone system for levee districts and road districts that we cannot refrain from quoting so much of their opinion as deals with that subject:

"A short recitation of the undisputed facts in this case will show that the assessment of benefits by the zone system in this case resulted in an arbtrary discrimination against the appellant. She owned a farm comprising about 3,000 acres, but only 700 acres are in cultivation or susceptible of being put in cultivation by any practical method. The rest of her lands are covered by lakes and other bodies of water to such an extent that, according to the undisputed evidence, it is not practical to drain it and thereby render it fit for cultivation. Notwithstanding this all her lands were assessed under the zone system and the lands under water was assessed at the same rate as those in cultivation where they were the same distance from the road. The Board of Assessors were bound to know the condition, the character, and configuration of the earth's surface within the proposed dis-

trict. We recognize that Courts cannot review the power of the Legislature, or its subordinate agency in the premises, unless the assessment has been made upon a demonstrable mistake of fact, or that in making it the Legislature or its subordinate agency applied an illegal principle, or arbitrary method of assessment.

The zone system as applied in the present case under the undisputed evidence fails, as unreasonable and not a fair substitute for a valuation made by a designated tribunal acting according to law, and therefore violates the 'due process of law' clause in our Constitution, which is a limitation upon arbitrary power and is a guaranty against arbitrary legislation. When the condition and character of the soil, and the configuration of the earth's surface is taken into consideration it is evident that the zone system of assessments in road improvement districts is necessarily arbitrary and discriminatory.

It is not like the case of a drainage or levee improvement district where the land is covered with water and the construction of the drainage ditch or the levee reclaims it. In such case it is impossible to forsee exactly how a proposed tax will fall, and if the construction of the improvement increases the value of the different classes of land within the district proportionately, the burden will be distributed in as fair and just way as can be done. But in a road improvement district the case is different. The road which it is proposed to improve is already laid out and in use; it serves the landowners adjacent to it and as well as the general public. As above stated its situation with reference to the land is known in advance of the assessment. To charge the cost of the improvement upon farm lands lying within designated distance on each side of the road at a fixed sum per acre, necessarily results in discrimination and is so obviously onerous and unreasonable that it cannot on any fair principle of reasoning and justice be said to be a valuation according to benefits.

The kind and character of the soil and topography of the lands in the district do not change. Natural objects such as lakes, streams, hills, and hollows remain the same, so that it cannot be said that the proof might be one way in one case and another way in a subsequent case. If an arbitrary or illegal method of assessment is adopted in the first instance, it is the same as if there had been no assessment of

benefits, and the landowner has a right to resist at any time a suit to place a lien upon his property as an illegal exaction if he remains in possession of his land by himself or through tenants."

SUMMARY OF JUDICIAL OPINION ON THESE ISSUES

On the issue as to whether the two-weeks notice given under this statute is due process, the exact question has been passed upon by the five Judges composing the Supreme Court of Arkansas, and Judges Sanborn, Kenyon and Symes, composing the Circuit Court of Appeals of the Eighth Circuit in Thornton vs. Road Improvement District No. 1, 291 U. S. 519. Chief Justice McCulloch and Justices Smith and Humphreys decided it was due process. Judges Wood and Hart, Judges Sanborn, Kenyon and Symes decided it was not due process—5 to 3.

Upon the subject of benefit assessments based upon county asessments and a zone system applied upon said county assessments, this issue was passed on by five Judges constituting the Supreme Court of Arkansas, and Judges Lewis, Booth and Faris, constituting the Circuit Court of Appeals of the Eighth Circuit in Mo. Pac. Ry. Co. vs. Road Improvement District No. 1 of Hot Spring County, 288 Fed. 502, and before Judges Sanborn, Stone and Trieber, constituting that Court in the case of Thomas vs. K. C. S. Ry. Co., 277 Fed. 708, and the result is that Chief Justice McCulloch, Judges Smith and Humphreys of the Supreme Court of Arkansas sustained the assessment, or rather declined to permit it to be questioned because suit was not brought within ten days after the assessment became final, while Justices Wood and Hart of the Arkansas Supreme Court, and Judges Lewis, Booth and Faris and Judges Sanborn, Stone and Trieber decided that they are arbitrary and void and so decided in independent suits, not relegating the plaintiff to the ten days suit provided in the Special Acts attacked.

Thus upon this issue three Judges have sustained the assessment and eight Judges hold it void in independent suits. The greater number of Judges ruling against this assessment among those sitting in judgment on rights in Arkansas should not control if their reasoning is not sound, but it is submitted that the reasoning of these Judges is

more consonant to the principles announced by this Court and more in accordance with common right and justice than that announced by the Judges whose opinion constitutes the judgment herein under review.

Respectfully submitted,

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[redacted]

No. 383

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 383, OCTOBER TERM, 1923

MRS. M. L. HOUSE,
PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 2 OF CONWAY COUNTY, ET AL.,
DEFENDANTS IN ERROR

REPLY BRIEF OF PLAINTIFF IN ERROR

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A SERIES OF PRESUMPTIONS

The case of the defendant in error as to the issue on due process rests upon a series of presumptions—some of these resting one upon the other.

FIRST is the presumption that notice of the introduction of the local bill was given (Brief p. 5).

SECOND, That the plaintiff is presumed to have knowledge of the passage of the Act of the Legislature (Brief p. 8).

THIRD, That the plaintiff is presumed to have notice of the local bill because the Legislature of 1919 passed 2,760 pages of Special Road Acts (Brief p. 9).

FOURTH, The plaintiff is presumed to have notice of the plans of the improvement, publication of which was given in two weekly issues of a local paper (Brief pp. 9, 10).

FIFTH, The plaintiff is presumed to have had notice of the assessment because of the two weekly notices published giving 18 days to complain against the assessment in question (Brief pp. 10-14).

As we view the case, this is the only question for determination on the due process issue. It has been discussed separately heretofore.

SIXTH, Next is the presumption that the plaintiff had 28 days notice, instead of 18, because she is presumed to know the provision of the Special Act, which gave her 10 days to appeal from the Board's action (Brief p. 14).

SEVENTH, The plaintiff is presumed to know the description of her own land and that it is within the district whose boundaries she is presumed to know from presumption of knowledge of the Act (Brief p. 28).

An analysis of these presumptions will demonstrate that they do not aid defendant in error—merely distract attention from the vital issue—whether the form of the notice and the publication given it—constitute due process under the circumstances of this case.

Regarding presumptions 1 and 2. If the Act was attacked because notice of its introduction was not given as required by the Constitution, and because it was not published, these presumptions would be applicable, but no such contentions are made. The complaint expressly disclaims an attack upon such grounds, and alleges the facts regarding the lack of notice, and that the Act was not published, not in circulation, and not known to the property owners, as circumstances to be considered in determining whether the proceedings under it were conducted in such a way that the property owners--resident and non-resident—would be reasonably likely to have notice of the purpose of the proceedings and their effect.

These facts are also pertinent as distinguishing this case from proceedings under pre-existing law where the property owners not only are presumptively aware of the existing laws, but where they are actually aware of the improvement being conducted, such as Bellingham Bay & B. C. R. Co. vs. New Whatcom, 172 U. S. 314; and cases where the process in question is not original process, attempting in the first instance to bring the parties before the Court, but was some secondary proceeding in matters already before the Court, such as Goodrich vs. Ferris, 214 U. S. 71.

Under the circumstances alleged and admitted, the Court should be more reluctant to say that a valid mortgage for $30,323.00 could be placed on plaintiff's farm on 18 days constructive notice twice published, than if such mortgage was attempted to be placed on her property under pre-existing local improvement laws in cities and towns, or in road and levee districts, with whose workings the people are not only presumed to be familiar, but, generally speaking, are quite familiar.

The third presumption is based on the theory that echoes of the 2,760 pages of the Special Acts must have appeared in local papers imparting knowledge to property owners, and therefore they must be on the watch to read the local papers to find out if their property is affected by some of these numerous Acts.

The answer to this proposition is made in the dissenting opinion of Judge Hart, not as a matter of opinion, but as a statement of the facts appearing from the records of the Legislature and the records of the Supreme Court and from current history of the State. The records of the Legislature demonstrated that these Acts were passed without previous notice being given, as required by the Constitution, and that they contained clauses that the public peace, safety and health required that they be put into effect at once, thereby precluding a referendum, and the records of the Supreme Court showed that many of these Special Acts were prepared by atttorneys representing special interests, and, if current history is the criterion, that practically all of them were prepared by such attorneys, and protesting land owners were given no voice in the matter.

He further stated that, according to the history of the times, there had been no public discussion looking towards the adoption of a system of constructing good roads throughout the State, but after the passage of these Special Road Acts there were reckless and extravagant statements as to the cost of the roads and the amount of Federal Aid which would be received, which were calculated to lull the landowners into non-action (R. pp. 38, 39).

The fourth presumption is that the plaintiff had notice

of the plans of the improvement, which plans were submitted to the County Court after two weekly advertisements of a hearing upon them. This notice, however (R. p. 20) fails to carry information of an assessment against any property in the district; in fact, does not disclose whether the improvement is to be made from special assessments, county funds, or otherwise. It also carries with it all the infirmities which the subsequent notice carries, in that it does not describe the district, other than Road Improvement District No. 2. It does not even show where it is located; it does not state what part of the county is included in it, and the fact that it has a number would indicate there are numerous other districts in the county. It gives no information whether the proceeding is under the general law for creation of road improvement districts, or under some Special Act.

The fifth presumption is that the plaintiff is presumed to have knowledge of the assessment from the 18 days notice twice published in the local paper.

We have heretofore discussed this question fully and called attention to circumstances under which such notice was given under a practically unwritten law, generally unknown to the property owners, and the insufficiency of the form of the notice and of the length of time through which information might be conveyed to non-resident property owners.

In view of the argument persistently made that because there was a 10-day period for right of action after the hearing on the assessments that the notice was 28 days, instead of 18, a consideration of that phase of it is invited.

On June 17 the assessments were filed and on that same day notice given that there would be a hearing on July 7th, wherein the property owners could complain of their assessments, and the limitation for an action against it expired on July 17th—just exactly one month from the day the notice was signed.

In Thornton vs. Road Improvement District, 291 Fed., 518, Judge Sanborn called attention to the fact that the proceeding there from the beginning to the expiration time for appeal occupied less than two months, and that the plain-

tiff had no actual notice of these proceedings for more than five months after the time for appeal had expired. This is worse, as there was only one month from the date that the notice was signed until action against the assessment was barred. It is, however, erroneous to tack the period of limition for suit on to the notice of hearing on the assessments.

In Bragg vs. Weaver, 251 U. S. 57, there was a proceeding so far as this issue is concerned similar to the one at bar. The statute provided that the property owner if dissatisfied with the amount allowed by the supervisors might appeal to the Circuit Court. Mr. Justice Vandeventer, speaking for this Court, stated: "This pre-supposes that he will have some knowledge of the situation." Certainly the right of appeal does not avail the land owner unless he has some knowledge of the situation, and the notice here in question does not give knowledge that there is a 10-days period in which he could appeal from the decision, and if he has not acquired knowledge of the hearing before the Commission through this process, certainly he has not acquired knowledge of the right of appeal, which is not mentioned in the notice for the hearing on the assessments.

In Common Council vs. Smith, 99 Mich., 507, there was a proceeding for a hearing before an assessor sitting as a board of review and from his action an appeal to the village council.

The Court held that there was not a legal hearing before the assessor, and it was suggested that the appeal should take the place of the hearing before the assessor, but the Court said it did not possess the power to dispense with a jurisdictional prerequisite by substituting another procedure which may be thought to constitute an equivalent. Notwithstanding the Supreme Court has held in this case that it was not necessary to appear before the board in an order to bring an action after the board acted, yet as the notice was given of a hearing before the board, the Court cannot substitute another action which may be considered an equivalent to the hearing of which notice was given.

The sixth presumption is that plaintiff had 28 days notice, instead of 18, because she was presumed to know

the law which gave her 10 days to appeal from the board's action (Brief p. 14). We have discussed this in another connection, but a further answer to it is the face of the notice itself (R. p. 1), which expressly calls upon property owners to file any complaint of assessments in writing before the 7th of July with the commissioners for a hearing before them at the First National Bank in Morrilton on that date.

In Roller vs. Holly, 176 U. S. 398, this Court expressly decided that a citizen of another state was at liberty, even if he was not compelled, to construe the notice as it read upon its face.

Counsel states that the construction of the Supreme Court of Arkansas on this subject is binding on this Court, and that is true to this extent, and this only—that in that 10 days any property owner had a right to file suit whether he had filed his complaint in writing or not, for such is the statute as construed, but it is for this Court—not the Supreme Court of Arkansas—to determine the effect of the notice as constituting due process. (Ballard vs. Hunter, 204 U. S. 260.) Where the notice itself expressly calls for a hearing at a given date and before a given body, the fact that there is a 10-day right of action thereafter cannot measure the effect of the notice itself where such right was not stated in it, but, on the contrary, presupposes finality in this hearing.

Counsel seized upon this construction of the statute by the Supreme Court and persistently argue therefrom that the plaintiff had 28 days notice (Brief pp. 14, 15, 16, 24); this is pyramiding presumptions.

The dissenting opinion (R. pp. 37, 38) effectually answers this argument on other and sufficient grounds. The seventh presumption is that the plaintiff is presumed to know the description of her own land and that it was in the district. This presupposes presumptive knowledge of the boundaries of the district by the landowner and is resting this other presumption upon that presumption. It is lifting oneself up by his own boot straps.

A REVIEW OF AUTHORITIES CITED

A review of cases relied upon by the defendant in error where their statements indicate pertinency may be useful. The case cited as decisive of this one (Brief p. 15) is Campbell vs. City of Olney, 262 U. S., 352. That action arose in August, 1921, under the Revised Statutes of Texas, published in 1911. Plaintiff in error contended that an ordinance was not passed specifically requiring the pavement in question to be constructed (which was a contested issue) and that there being no valid ordinance, there was no valid assessment, and the levying of the same was taking property without due process, and relied upon Crane vs. Siloam Springs, 67 Ark., 30, as an authority for this position.

The question of whether an ordinance was passed conformable to the state statute was a question for the State Court to determine, and only left for decision in this Court the question of whether there was due process against the land owner.

The Texas statute provided for 20 days notice of a hearing before the council and 20 days thereafter to bring suit. Personal notice was served and the land owner went to the council meeting, which had then adjourned.

He offered no excuse for not appearing before its adjournment and did not bring his action in the 20-day period, but let the assessment become final and then resisted payment.

This was a proceeding under an old general law; actual, not constructive, notice was given for 20 days and the land owner appeared pursuant to it.

Whether he was too late in his appearance before the council, or its too expeditious, is left for inference; but clearly he had 20 days thereafter to pursue an established statutory action, which he did not do; of course there was no federal question involved. Here there was no pre-existing law, no actual notice, only constructive notice for 18 days of a hearing before commissioners of a numerated district, which was published for two weeks, and the notice contained no description of the road to be improved; and the proceeding was under a practically unwritten law; there was no

mention in it of a right of action against the action of the commissioners within 10 days.

Next is cited Milheim vs. Moffat Tunnel Improvement District, 262 U. S., 710, of which case counsel say there was publication in two issues a week apart, "Yet it was held that this statute was valid under the Fourteenth Amendment. There the notice was for eight days; here it is for twenty-eight." (Brief p. 15.) This statement contains two errors: The manifest one last mentioned that the notice here was for 28 days, and also that the notice in the Moffat case for 8 days, which was not shown to be a fact.

However, it is misleading to say that the statute was held to be valid under the Fourteenth Amendment. It is true the statute was held valid, but the question of sufficiency of notice was not mentioned.

The complaining property owners there raised no question whatever of the notice; they attacked the Act on other grounds and brought suit attacking it before the date set for hearing and without filing objections before the commissioners. In fact, they chose to bring an independent suit, rather than go before the commissioners with their objections, as called for in the Act, with full knowledge of the remedy there provided.

The questions presented in their suit and decided have no relation to the question of notice.

There were three questions discussed by this Court: First, the public nature of the improvement; second, the classification as to special benefits, and third, the basis of the appraisal of benefits.

Ballard vs. Hunter, 204 U. S., 241, is the next case cited, and counsel say that "Notice was for four weeks—28 days—the precise period that was given plaintiff here." (Brief p. 16.)

The proceedings in Ballard vs. Hunter were under the St. Francis Levee District Act, passed in 1893, creating eight counties in eastern Arkansas into a levee district. The order under review was entered February, 1898, five years after the Act was passed and long after much, or all, of the levee

had been constructed.

It was a suit for the collection of delinquent assessments and a foreclosure of the lien therefor. It was filed against the delinquent lands in Crittenden county and gave a description of the lands, and the name of the supposed owners, and the notice was published for four weeks in Crittenden county and this notice described the land, the name of the supposed owner and gave the amount severally due upon each tract and gave notice of the time and Court in which to make defense.

Attention is particularly called to a discussion of this question in the Supreme Court of Arkansas (74 Ark. at p 180), which was sustained by this Court. The Court stressed the fact that the law of which the non-resident owners were bound to take notice advised them that their land in the levee district was subject to taxation for levee purposes, and the time and place where the taxes were levied and payable, and if not paid that suit would be instituted to enforce collection by sale, and that the notice of the pendency of such suit would be given by publication in a newspaper in the county where the land was situated, and the law warned these non-resident owners of the necessity of being vigilant and gave them information to protect their lands against sale, and gave them three years to come in and have a decree vacated on the showing that the taxes had been paid.

What a different situation here. When this two weeks notice was published there had been a law, not in the books, but in the files of the Secretary of State's office for three months only. No improvement had been made warning taxpayers as in the Bellingham Bay & B. C. Ry. Co. vs. City of New Whatcom, 172 U. S., 314, and in Ballard vs. Hunter case, that the improvement was being made and that the improvement would have to be paid for in the usual way under pre-existing law.

Under the statutes of Arkansas, taxes are payable from the 1st of January to the 10th of April, and a vigilant property owner will in that interval ascertain the amount of taxes charged against his property so that he can pay the same before the 10th of April without penalty.

Mrs. House made the usual inquiry in January, 1920, for the taxes due against her property for 1919, and then learned of the assessments that had been levied in these road districts against her property.

None of the elements placing property owners upon notice, such as the construction of an improvement to be paid for by special assessments, the creation of a great public enterprise like the Moffat tunnel or the St. Francis levee, or public elections held as to whether a given improvement like the Tulare Irrigation District, should be undertaken, which from their nature informed the property owners that these well known improvements would have to be paid for, existed in this case.

Here there were only two weeks publication, and instead of describing the land to be assessed, listing the name of the supposed owner, setting forth the amount to be assessed against it, as was done in the Ballard vs. Hunter proceeding, there was an indefinite advertisement to the effect the assessments in Road District No. 2 were completed and on file with the county clerk, and a hearing would be held at the Bank of Morrilton on the 7th of July of any complaints against the assessments therein made without indicating the property affected, the amount of the assessments, the supposed owners of the property, the boundaries of the district, or the authority under which the district was created and assumed to act. Yet on such notice a $30,323.00 mortgage was placed on the plaintiff's farm at the end of 18 days, subject to a right not mentioned in the notice, to bring a suit within 10 days thereafter to question it. A statement of this case and a statement of the case in Ballard vs. Hunter shows how far the latter is from sustaining the former.

The next case cited is Spencer vs. Merchant, 125 U. S., 345, as sustaining an assessment on 20 days notice published for two weeks. As this was an assessment in the village of New Lots, a suburb of Brooklyn, such an assessment might have been sustained on the principle announced in Jacobs vs. City of Paris, 131 Ark., 28, where the Court held that in view of the limited areas of local improvement districts in villages and towns, a shorter notice would be sufficient on account of the notoriety which such improvement created

than otherwise; but counsel have not read the Spencer vs. Merchant case aright.

The assessment based on the 20 days notice referred to was held void for a reason not pertinent here, and the assessment before the Court was a direct legislative assessment and the discussion there had no bearing on the issue here presented.

Counsel quote at length from Huling vs. Kaw Valley Ry. Co., 130 U. S., 559, brief pages 17-20. It was a condemnation proceeding where the Court appointed commissioners to make the location, appraisement and assessment of damages for a railroad right-of-way. The commissioners were required to give 30 days notice by publication. This notice was duly published notifying the land owners on the line of the road as located, or as it might be thereafter located, that a railroad right-of-way would be taken through Section 23, Township 25, Range 11, and warning them that at a given time and place assessment for damages would be made for the land taken. Thus a specific description of the route as near as possible was given to each 640 acres affected. Certainly, as the Court stated, no more definite notice was possible under the circumstances. In the first place it was a proceeding in Court with the attendant publicity; and doubtless was based upon surveys made through the land; and contained a definite description of the particular section through which the right-of-way was to be taken; and a warning to all who owned property in that particular section to appear at a certain date and place where the damages would be assessed.

Here there was two weeks notice covering 18 days and a vague and indefinite description of a certain numbered road district, without describing the territory affected, or the authority for the proceedings. Nothing to attract the attention of land owners to it as affecting their lands.

The proceedings in the Huling case were under also existing and well-known laws for the condemnation of property and were court proceedings and not a quiet meeting in a bank.

At brief page 22, counsel refer to Falbrook Irrigation

District vs. Bradley, 164 U. S., 102, and set out Section 20 of the Act under consideration and quote from the opinion of the Court which they say is upon this statute. The quotation refers to the statute, but not solely to Section 20 thereof. The pertinent parts of the statute are set out in a foot note to the decision; Sections 1, 2 and 3 of the Act provided for a petition for the creation of an irrigation district to be filed either by a majority of property owners, or at least 50 property owners, and a notice of a hearing on that petition, and, if it were sustained, then for an election to be held as to whether a district as described in the notice should be created, and after created then the assessment was made and filed, and then comes Section 20 of said Act providing that at least 20 days notice, and not more than 30, should be given for a hearing on the assessments.

Such a district is quite similar to improvement districts in Arkansas, the provisions of several of the most prominent of which have heretofore been set out in our brief, and concerning such districts created on a petition of a majority in value, the Court in Stiewel vs. Fencing Dist., etc., 71 Ark., 17, said: "We are aware that twenty days is an exceedingly short statute of limitations. * * * * * Such improvements, that require a majority in value of the property owners living in the district to set them in motion, are likely to be generally discussed, and, therefore, it is not probable that people interested will be taken unawares. So, considering the nature of the improvement and the steps to be taken to initiate and complete it, we are not willing to say that twenty days is an unreasonable time."

At page 24 of the brief is a quotation from Secombe vs. Railroad Co., 23 Wall., 108, and it is prefaced by the statement that "The statute provided for a notice published four weeks—the same as here," etc.

That case illustrates an instance like Ballard vs. Hunter, where four weeks publication is held good constructive service. It was a condemnation proceeding under Acts in existence more than ten years before the suit was filed. An application was made to the District Court for the appointment of three commissioners, 30 days notice by publication was required setting forth the land to be condemned, and

this was given and the commissioners were appointed.

Then the commissioners were required to give four weeks notice by publication of a meeting to appraise the damages and no question was raised as to the certainty of the description of the property to be condemned.

In that case more than 60 days notice of the proceedings was given and necessarily a survey of the ground was made prior to these notices. In fact, it was contended that the railroad was already constructed upon the land condemned. The precise notice in question was from October 26th to December 2nd. Such a proceeding is not authority to sustain a two weeks publication covering 18 days under a new Act for a new district, where there were no acts, such as surveys, improvements constructed, or a petition for property owners to sign, the circulation of which tended to bring notice to the property owners.

The other cases cited on this subject have been analyzed in our first brief and no further comment will be made upon them, except as to the criticism of Judge Sanborn's opinion (Brief p. 27) in Thornton vs. Road Imp. Dist. No. 291, Fed. 528.

Counsel would make it appear that that decision turned upon the fact that the notice was published in a local paper, and they ask where it should be published if not in a local paper, and argue as if the decision required the publication to have been other than in the local paper.

There is nothing in Judge Sanborn's opinion justifying such an inference. The statement in question is as follows:

> "The only notice of the hearing required to be given was the publication of a notice thereof twice in a newspaper published in Clark County, Arkansas, and the question is: Were these citizens of the United States estopped from all relief by an original suit in a Federal Court from this discriminatory and excessive assessment and taxation because the proceedings therefor were in accord with the statutes of Arkansas? The question is not entirely novel."

Then Judge Sanborn proceeds to review the cases in this Court and in the lower Federal courts on the issue involved, in his usual learned and accurate manner and demonstrated from these authorities that a discriminatory and arbitrary assessment can not be sustained in an attack upon it in an independent action, although the statutes of the state in this particular instance had been literally complied with and the time therein mentioned for the suit had expired; because such notice in the given circumstances did not constitute due process.

FORM OF NOTICE

At page 29 it is stated that the plaintiff contends that unless the notice prints the entire assessment of benefits it is not due process of law. This statement is as unwarranted as the criticism of Judge Sanborn's opinion in the Thornton case. At page 35 of our brief attention is called to the various matters omitted from this notice, the inclusion of any one of which might have made it good. These matters are: First, the absence of a reference to the Act under which the district was created; second, the absence of any notice of the boundaries of the district; third, the absence of a description of the land; fourth, the absence of the names of the owners of the land; fifth, the absence of the location of the district; sixth, the absence of the nature of the charge and amount thereof.

In a review of the many cases bearing upon this issue it is found that some or all of these elements are present in the notices which have been sustained, and here the Court is asked to sustain a notice that contains none of the identifying factors which have imparted notice in other cases.

"AMOUNT OF ASSESSMENT NOT OPEN TO QUESTION" (?)

Under this caption the defendant in error argues that two weeks notice being sufficient compliance with the due process clause and the 10-day period allowed for bringing the action having expired before this suit was brought, "that it is now too late for her to complain that her assessment was unjust, or even that it was confiscatory." (Brief p. 30.)

They cite three cases from this Court to sustain that contention: Mulheim vs. Moffat Tunnel Imp. Dist., 262 U. S., 710; Farncomb vs. Denver, 252 U. S., 7; and Campbell vs. Olney, 262 U. S., 352. Farncomb vs. Denver, like the Moffat tunnel case heretofore reviewed, was where the property owners in advance of a statutory hearing filed an independent injunction proceeding, although they had due notice of a statutory hearing, but elected to disregard it.

Campbell vs. Olney, as heretofore shown, was a case where there was actual and apt notice of the hearing and a belated appearance thereto and a refusal to proceed under the statutory remedy. None of these cases go to the issue where there is no actual notice until after the limitation had expired, nor to the question of the sufficiency of the constructive notice, such as the one in question.

It is true that the Supreme Court of Arkansas in this case, and in Bush vs. Delta Road Imp. Dist., 141 Ark., 247., sustain this position of counsel, but it is equally true that prior to the decisions growing out of these special road district cases the Supreme Court of Arkansas held exactly to the contrary, holding the question of confiscation was open in an independent action, notwithstanding the statutory limitation on an appeal, or an action to correct an arbitrary or confiscatory assessment had expired, or was not availed of.

The cases so holding are reviewed in our first brief in the No. 5 District case submitted with this one, pp. 10, 11, and are discussed in the dissenting opinion in this case (R. pp. 40, 41).

A review of the authorities and the reasoning thereupon by Judge Sanborn in Thornton vs. Road Imp. Dist., 291 Fed., 518, are so convincing that we submit this question upon that opinion and the dissenting opinion in this case. Counsel admit there are a few cases where assessments were plainly and demonstrably unjust that this Court has sustained an independent action against them and cite the leading cases, pp. 32, 33 of their brief. The cases are more facetiously than accurately described. They add, however, that no outrageous abuse of power is before the Court here,

and in answer to this we ask you to turn to the undisputed facts: Owing to the timber having been cut from plaintiff's land, through a series of years, the value of the same for county and state purposes had been reduced on a hearing before the county board from $43,030.00 to $30,320.00, and this was done before this road district assessment became fixed.

It is admitted that the commissioners did not know this fact at the time and that had they known it they would have used the assessment of $30,320.00 instead of the assessment of $40,030.00 as the basis for the benefit assessment (R. p. 3).

Thus her assessment starts on a basis of 30 per cent excessive, yet this is but a small item of the discrimination in her assessment. Three hundred acres of her lands have been washed away by the Arkansas river and are nonexistent (R. p. 9), and yet bear an assessment representing benefits from the improved road.

Of the 3,200 acres assessed, only 700 acres are in cultivation; 200 or 300 more acres are susceptible of cultivation; 250 acres are a rocky ridge of no value, and 1,743 acres consist of bayous, lakes and cypress brakes unfit for cultivation and without valuable timber (R. p. 10).

Much better land than hers lying within a levee and immediately adjacent to hers and protected from overflow are assessed less than her land (R. p. 10). That 1,030 acres consist of low, wet and overflow lands, not timbered and not susceptible of cultivation, except through a system of drainage and levees of prohibitive cost, are assessed $5.00 to $20.00 per acre and should be subject to a county assessable value of not over $2.50 per acre, whereas its actual assessment is from two to eight times such amount (R. p. 14).

That her 700 acres of good lands, part of which is subject to overflow, are assessed from $22.50 to $30.00 an acre, and $30.00 is the highest value assessed against any land in the county, and other land assessed at $30.00 per acre is worth double the plaintiff's land assessed at the same sum.

Land in her immediate vicinity more accessible to the road than her lands and worth double her best land is assessed

$30.00 per acre; that hundreds of acres of land adjacent to her land and more accessible to the road than her land and of equal or greater value than her best land are assessed from $5.00 to $15.00 per acre (R. p. 14).

On such discriminatory valuations special assessments of 33⅓ per cent of these valuations are placed against 420 acres of her land and the rest of her land assessed on 50 per cent of these valuations, regardless of the non-existent tract of the land and the constituent elements of the major part of the balance consisting of bayous, lakes and cypress brakes.

Counsel at page 39 set out a purported quotation from Valley Farms Co. vs. Westchester County, 261 U. S., 155, which we fail to find. This case held that where there was a legislative assessment of benefits based on assessed valuation for general purposes that this fact did not of itself present a case of "palpably arbitrary, and a plain abuse" of power.

It is further stated that the State Court held that as the rolls of the local assessors were adopted and that the right of the owners to be heard as to values on their assessment was adequate protection, and this Court, under the circumstances, agreed that the owners could demand no more. Here is quite a different situation. Had the Legislature established these assessments based on the future local assessment for general taxation where the property owner could have had a hearing on his valuation, the case would be in point, but the Legislature did nothing of the kind. It delegated to the commissioners the duty of determining the benefits and the commissioners adopted, not the current or future assessment, subject to annual revision by the county officers after a hearing, but adopted a former assessment two years old, now admitted to be $13,000.00 excessive in this case, and upon this excessive assessment based a benefit assessment of $19,000.00, providing for its payment to extend over a period of twenty years, making a total charge against the land of $30,323.00 (R. p. 4), with no opportunity for local hearing on the general assessment and no opportunity for annual readjustment.

Next is cited Embree vs. Kansas City Road Dist., 240 U. S., 243, and we fail to find in the opinion the quotation at page 35 of the brief.

The statute there discussed provided for the ratings to be fixed by a delegated body and when fixed they fell into zones established by the Legislature itself. An entirely different situation from the one presented here, where the zones are created by the delegated body on the ratings of a former assessment, now admitted to be excessive, arbitrary and discriminatory.

The zone system as applied here is inherently confiscatory —no inspection of the lands was made, no determination of benefits to particular tracts was made. A zone system of assessment was devised applying, irrespective of benefits, a percentage of a discarded county valuation, determined by distance and other considerations, regardless of the fact that two-thirds of the land assessed was in the Arkansas river or submerged in lakes and bayous.

ESTOPPEL

It was stated at brief page 35 that the record shows that shortly after the confirmation of benefits the district issued its bonds, which were sold on the market, and with the proceeds it had almost finished the road before the plaintiff brought suit. There is no such evidence in the record. There is an allegation somewhat to this effect in the answer (R. p. 17), but no admission of its truth by demurrer or otherwise is made and no evidence in the record to sustain it. The record shows that testimony was taken by both parties before the trial tending to sustain their respective allegations, but the case was tried only on demurrer to the complaint and non-federal questions of facts, which questions are set out in the decree (R. p. 23), and have no relation to this point, and it is stipulated that the evidence upon these issues which were tried are immaterial to the Federal question (R. p. 2).

Hence the counsel's predicate to the estoppel theory is without a base; but in the event this issue should be tried on a remand, we will discuss it as if it were in the record, because it may hereafter be brought into the record.

In the next paragraph, brief p. 39, counsel state that the plaintiff's first knowledge of the district was in January, 1921, and she did nothing after receiving personal notice until May 26, 1921, when this suit was brought, and in the meantime the road building was continuing. These are not the facts as shown in the record.

This assessment was made in July, 1919. Mrs. House was then living in Washington and had been for eleven years, and in January, 1920 (tax paying time) she wrote to ascertain her taxes for 1919 and then learned of these districts and these assessments (R. p. 10).

For that tax paying period, to avoid penalties, she paid under protest the 1919 assessment of $1,516.10, and frequently since learning of this arbitrary and excessive assessment appealed to the commissioners for relief, and they denied it; and as penalties were about to accrue for nonpayment of the 1920 taxes and as the warrant for their collection was then in the hands of the sheriff, she brought this action (R. p. 10).

Assuming that bonds were sold and contracts for the construction let, such was done either before January, 1920, or after that date. If done before January it was before any information had come to the plaintiff of the existence of the district; if after January, the commissioners proceeded with full knowledge that the plaintiff was frequently appealing to them for relief from what she termed an arbitrary, excessive and discriminatory assessment, and in evidence of her attitude towards it she paid her taxes for that year, to avoid penalties, under protest; itself potent notice of her position.

A review of some of the authorities cited upon this proposition is useful.

Tulare Irrigation District vs. Shepard 185 U. S., 1, is first cited. An irrigation district was duly formed under the California laws, but the notice of the petition was unsigned and the Court assumed for the sake of the argument that the district was only a de facto district, not a de jure district.

An innocent purchaser of bonds sued the district; some property owners also defended on the ground of the illegality of its organization. The Court held the district estopped and held the property owners had acquiesced in the bond issues; that they had full knowledge of the proceedings as there had been two public elections in the district and the proceedings were all of a public nature and the bonds issued and sold and the proceeds spent in improvement, and the property owners paid taxes for several years thereafter; the Court held as against an innocent holder of the bonds they had acquiesced in the proceedings and it was too late to question the validity of the district and the consequent bond issue.

No such facts are here. Here was no public election, no proceedings of such publicity as carried notice to property owners, no acquiescence in the expenditure of money raised from the bonds, and no voluntary tax payments for several years, and no question of an innocent purchaser of bonds.

Shepard vs. Barron, 194 U. S., 553, is next cited. In that case there was a written petition by the complaining land owners for the improvement; the work was fully done as requested by them, frequent statements were made by them of the validity of the work and the regularity of the assessments to be made; and specific statements for the purpose of inducing an issuance and sale of the bonds that the work was properly done, and there was no defense to the bonds.

Of course such conduct worked an estoppel.

In O'Brien vs. Wheelock, 184 U. S., 450, the principle announced is decisive of any evidence which may be offered in this case. There the land owners procured the passage of a levee Act and participated in the organization of the levee district and in various ways furthered the organization of the district on the assumption that the Act was valid. It turned out it was not valid and it was held that they were not estopped in the suit of a bond holder to set up the illegality of their assessments. The principle was stated as follows:

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their

claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

This principle is controlling here. The allegations of the complaint admitted by the demurrer certainly show no "neglectful repose" by the plaintiff, and the unsupported allegations of the answer failed to show any change of situation induced by the "neglectful repose."

In Thornton vs. Road Imp. Dist. No 1, 291 Fed., 518, the facts were the same as here. There was a payment under protest before suit was brought and the suit was brought to recover that payment and to enjoin the collection of further assessments, and the Court of Appeals sustained that suit both as to the injunction and the recovery of the assessment paid under protest. That is the relief asked here, and it is respectfully submitted that is the relief which the plaintiff is entitled to receive.

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IN THE

United States Supreme Court

MRS. M. L. HOUSE.....*Plaintiff in Error,*

v. No. 383 of October Term, 1923.

ROAD IMPROVEMENT DISTRICT NO. 2
OF CONWAY COUNTY
ET AL.....*Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

This is a writ of error to the Supreme Court of Arkansas to review a judgment upholding an assessment on the lands of the plaintiff in error, hereinafter called the plaintiff, made by the defendant improvement district.

The assessment is attacked on the ground that the statute under which it was made does not provide for adequate notice and because the assessment is so excessive as to take the plaintiff's property without due process of law.

The contentions of the plaintiff are so admirably refuted in the opinion of the court below that we feel sure that if the court will

read that opinion, it will dispense with the reading of this brief. As reported in 158 Ark. 230, the type is much clearer than in the printed transcript on this appeal.

Though we feel that the opinion of the Supreme Court of Arkansas contains everything essential to expose the fallacies of the plaintiff's brief, yet we shall proceed to express our own views at perhaps unnecessary length and with needless citation of authorities.

NOTICE ADEQUATE.

Counsel say that notice of the intended introduction of the bill creating the district was not given as required by the Arkansas Constitution, and that this is admitted by the demurrer.

If there is anything which the Supreme Court of a State should be allowed to settle, it is the effect of a demurrer under the local practice; and the court below differs entirely from counsel. In 158 Ark. 341, it says:

"In support of this argument appellant insists that the demurrer filed and sustained to the allegation of the complaint, that no notice of the intention to introduce the special bill enacting this legislation was given and published as required by section 26 of article 5 of

the Constitution, admitted the truth of that allegation. But this was not the effect of the demurrer. The demurrer did not admit the allegation that notice had not been given, but submitted to the court that, as a matter of law, the question was one into which the courts would not inquire, for the reason that the question of the fact of notice, as well as its form and sufficiency, was a legislative, and not a judicial, question. *Booe* v. *Road Imp. Dist.*, 141 Ark. 140. In other words, a demurrer admits only those facts which are well pleaded. *Pierce Oil Corporation* v. *Hope*, 248 U. S. 498; *Pierson* v. *Wallace*, 7 Ark. 282, 290; *Keith* v. *Pratt*, 5 Ark. 661."

Consequently, there is no such admission, and the presumption is that notice of the introduction of the bill was given as required by sections 4966 and 4967 of Crawford & Moses' Digest, which are as follows:

"Section 4966. *Notice.* It shall be unlawful for any local or special bill to be passed by the General Assembly unless thirty days' previous notice of the intention to apply therefor shall have been published as hereinafter provided. Act December 4, 1874, p. 54, Sec. 1.

"Section 4967—*How published.* Such notice shall be published by handbills (printed or written) conspicuously posted in at least five of the most public places in the locality where the mat-

ter or thing to be affected shall be situated or by publication in some newspaper of general circulation in said locality. Id. Sec. 2."

It is the established law in Arkansas that the question whether notice was given is for the legislature alone, and that the courts cannot look into the matter.

Davis v. *Gaines*, 48 Ark. 370.

Waterman v. *Hawkins*, 75 Ark. 120.

Caton v. *Western Clay Drainage District*, 87 Ark. 8.

St. L. S. W. Ry. Co. v. *State*, 97 Ark. 473.

State v. *Woodruff*, 120 Ark. 406.

Booe v. *Road Imp. Dist.*, 141 Ark. 140.

Road Imp. Dist. v. *Sale*, 154 Ark. 551.

Plaintiff says that she was living in Washington City, and knew nothing of the matters complained of until January, 1921. The question is not what she knew, but what she should have known.

In *Ballard* v. *Hunter*, 204 U. S. 241, this court said, on page 262:

"It should be kept in mind that the laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. A law must be framed and

judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in *Huling* v. *Kaw Valley Railway & Improvement Company,* 130 U. S. 559, where it was declared to be the 'duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition, and if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

That case is peculiarly in point because, like this, it was on writ of error to the Supreme

Court of Arkansas, and it sustained the first local improvement statute passed under the Arkansas Constitution of 1874, upon which this and all subsequent acts of the kind have been modeled.

In the light of this decision let us consider what notice the plaintiff must be deemed to have had.

She had thirty days' notice of the intention to introduce the bill.

She was bound to take notice of the statute creating the district. As was said in *Ballard* v. *Hunter,* 204 U. S. 262: "The law cannot give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions."

Counsel say that the proceedings complained of were had before the official publication of the statute; and that therefore she was not bound to notice them. There is no provision in the Constitution of Arkansas or in the Fourteenth Amendment that a statute shall not be binding until published. Every statute in Arkansas, when approved by the Governor, is deposited with the Secretary of State, where it is open to inspection, and every one must inform himself of its provisions.

The statute went into effect on the 11th of March, 1919, and the plaintiff had until July 17,

1919, a period of over four months, in which to familiarize herself with its provisions.

The plaintiff says that she did not know that the act was passed or contemplated. The two immense volumes of special road acts passed by the Arkansas Legislature in 1919 and embracing 2760 pages, are the best answer to that. This immense quantity of legislation, creating road improvement districts in every county in the State, could not have been passed without attracting general notice. Echoes of it must have appeared in all the local papers. It is incredible that this act, creating five road improvement districts in Conway County, could have been passed without the knowledge of the local newspapers and of the greater part of the citizens; and the nonresident must know those things that are known to the other landowners.

The act (Ark. Road Acts of 1919, Vol I, p. 1038) provides:

"Section 18. Immediately on the filing of said plans with the county clerk, the clerk shall give notice by publication once a week for two weeks in some newspaper published in the county, designating a date when the county court will be in session, for the submission of said plans to it, the last insertion of said notice to be not less than five days before the date of the consideration of said plans by the county

court. Said notice may be in the following form:

" 'Notice is hereby given that the plans for the improvement in Road Improvement District No. ..... have been filed in my office and are now open to inspection, and that said plans will be submitted to the county court for its approval or modification on the ..... day of ....., 19..... All parties interested are hereby notified that they will be heard in regard to said plans on the date named, or on any date to which the county court may continue the hearing.'

"Section 19. On the date named in said notice, the county court shall consider said plans and shall hear any landowner interested therein, who may desire to be heard; and said hearing may be continued from time to time until completed."

The plans were filed on May 17, 1919; notice of the hearing was duly published on May 22 and 29; and the plans were approved on June 14, 1919, the day fixed in the notice. Plaintiff therefore had notice that the district was about to build its road, and an opportunity to object to the plans, had she seen fit.

Sections 20 and 21 of the act are as follows (Ark. Road Acts of 1919, Vol II, page 1040):

"Section 20. Immediately after the approval of said plans by the county court, the

commissioners shall proceed to make an assessment of benefits to be received by each tract or parcel of land, railroads and tramroads, and all other real property within the district, and shall inscribe the same in a book, in which all of the lands shall be shown, and shall show opposite each tract in said book, the assessment of benefits against each tract. The name of the supposed owner shall be shown opposite the several tracts, but a mistake in the name shall not affect the regularity or validity of the assessment. The tracts and parcels of land, railroads and tramroads, shall be shown in such description or subdivision as may be convenient. If any lands in said district are or will be damaged by reason of the making of said improvement, the amount of the damages shall be assessed by the commissioners and shown in said book opposite the tract of land damaged. The assessment book containing all of the land shall remain in the custody of the commissioners, and a copy of the book showing the lands shall be filed with the county clerk. Immediately upon the filing of the said book the county clerk shall give notice by publication once a week for two weeks in some newspaper published in the county, stating the fact that the assessment of benefits and damages to the land in said district has been filed in his office, and that the assessment of benefits for the lands is in the hands of

the commissioners, and designate a date to be fixed by the commissioners on which the commissioners shall hear any complaint of said assessment, the said date to be not less than ten (10) days after the last insertion of said notice. Said notice may be in the following form:

"*Notice of the Assessment of Benefits in Road Improvement District No. ..... of Conway County, Arkansas.*

"Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number ..... of Conway County has been completed and is on file with the secretary of said commissioners, and is open for inspection, and a copy of said assessment of benefits and damages is on file in my office and open to inspection, and that the said commissioners for said district will on the ..... day of ..... attend at ....., Conway County, for the purpose of hearing any complaints against any of said assessments of benefits or damages. Any complaint of any of said assessment of benefits or damages must be filed with the secretary of said commissioners in writing before the date of said hearing.

"On the date named in said notice, the commissioners shall attend at the place named for the purpose of hearing any complaints against any of said assessments of benefits or damages,

and shall hear any complaints that have been made in writing and filed with the secretary of the board before the date of said hearing, and shall hear in person any parties who may appear in support of said written complaints. Any party not complaining in writing of any of said assessment of benefits or damages in the manner and within the time herein provided, shall be deemed to have waived any objection he may have thereto. At the said hearing, the commissioners shall consider said assessment of benefits and damages, and any complaint that may be filed thereto, and if they find any assessment of benefits or damages is inequitable or unjust they shall correct the same so that it will be equitable and just.

"Section 21. Any party who may have complained in writing of any of said assessments of benefits or damages, and who feels aggrieved by the action of the commissioners after the hearing herein provided for, and *any other person whomsoever who may have any objection to any assessment of benefits or damages, or to any other proceedings under this act or action of the commissioners,* shall file his complaint thereof in the chancery court having jurisdiction within ten days after the hearing by the commissioners herein provided for, and any party not complaining within that time shall be deemed to have waived any objection

he may have to any of said assessments of benefits or damages, and shall not be heard to complain in law or equity thereafter, and no suit shall thereafter be brought in any court attacking the validity of any of said assessments of benefits or damages. If the assessment of benefits or damages against any tract shall be found invalid by the court within the time limited, the commissioners shall proceed to make another assessment of that tract or parcel of real property under the direction of said court; and if the entire assessment is set aside by the court, the commissioners shall proceed to make a new assessment in the manner and after the notice as herein provided for the original assessment."

The assessment of benefits was filed on June 17, 1919; notice was duly given by publication on June 18 and 25 for a hearing on July 7, and on that day the assessment was confirmed. This suit was not brought until May 17, 1921, almost two years after the confirmation of the assessment. In the meantime the district had issued its bonds, which had passed into the hands of innocent purchasers, and had almost completed the work of improvement.

The plaintiff had 18 days in which to complain to the commissioners of her assessment, and ten days longer in which to complain to the courts, making in all 28 days. She says that

that was not enough; but as she did not learn anything about the matter for a year and a half, it is not apparent how a longer notice would have done her any good. Surely she cannot demand that a much needed improvement must be delayed for a year and a half because she pays no attention to her own interests.

Since this writ of error was sued out, this court has rendered decisions which, if handed down a little sooner, would probably have saved plaintiff the expense of this proceeding.

In *Campbell* v. *City of Olney*, 262 U. S. 352, the plaintiff in error was given by the statute 20 days in which to bring suit to set his assessment aside. He did not sue within the time limited, and this court held that his contention that the statute deprived him of his property without due process of law was not even colorable.

In *Milheim* v. *Moffat Tunnel Improvement District*, 262 U. S. 710, the notice of the assessment of benefits was given "by publication in two issues a week apart in a newspaper of general circulation published in each county." (p. 714). Thus, the hearing could have been had on the eighth day after the first publication of the notice. Yet it was held that this statute was valid under the 14th Amendment. There the notice was for eight days; here it is for twenty-eight.

Before this writ of error was sued out the law was clearly established by the decisions of this court.

In *Ballard* v. *Hunter,* 204 U. S. 241, the notice was for four weeks—28 days—the precise period that was given the plaintiff here, and it was held due process of law, though the complaining party was a nonresident, who never saw the notice, and knew nothing of the proceeding until his land had been sold for the taxes.

It is true that counsel for the plaintiff says that the statute now before the court gave her only 18 days; but the court below says that it gave her 28 days. It is for the Supreme Court of Arkansas to construe the statutes of that State, and for this court to say whether the statutes, so construed, are in violation of the federal Constitution. As was said in *Witherspoon* v. *Duncan* 4 Wall. 210, 217, "It is not the province of this court to interfere with the policy of the revenue laws of the States, *nor with the interpretation given to them by their courts.* Arkansas has the right to determine the manner of levying and collecting taxes."

And in *Ballard* v. *Hunter,* 204 U. S. 260, it is said:

"What the statute required was for the Supreme Court (of Arkansas) to determine;

whether, as determined, it constituted due process is for us to decide."

So, in *Farncomb* v. *Denver,* 252 U. S. 7, 10, it is said:

"This court, when dealing with the constitutionality of State statutes, challenged by the 14th Amendment, accepts the meaning thereof as construed by the highest court of the State."

So, in *Costello* v. *Monaco,* 168 U. S. 674, 680, it is said:

"The decision of the State court that the advertisement was sufficient under the Louisiana statute involved purely a State question, which we accept and follow. Conceding that a sale to enforce taxes made without notice would be a want of due process of law, *it is yet obvious that a publication for thirty days required by the State law was sufficient notice to constitute due process of law.*"

In *Spencer* v. *Merchant,* 125 U. S. 345, 347, a suit involving a local assessment for laying out a street, the statute provided for "public notice in two or more newspapers in the county at least twenty days before meeting for that purpose, of their intention to make the award and assessment required by this act," and it was held due process of law.

In *Huling* v. *Kaw Valley Railway,* 130 U. S.

559, 561, a proceeding to take property under the right of eminent domain, the notice to the nonresident landowner was "by publication thirty days before the time fixed in some newspaper published in the county." And on page 563, it is said:

"It notified persons owning land in that section that the commissioners duly appointed would, on Monday, the 22d of May, 1882, proceed to lay off the route for said road through said section and appraise the value and assess the damages to each quarter-section through and over which the railroad might be located. To the plaintiffs in this case, who are the owners of a quarter section of land in section 23 of that township, this was a sufficient warning that the road might run through their land at that point, and sufficient notice of the time and place where this matter would be determined, as also the amount to which they would be entitled for the appropriation of their land. If this notice had been read by the plaintiffs, it was a clear and distinct notification to them that it would be determined at that time whether any, and how much, of their land in section 23 would be taken for the railroad, and the value to be set upon it by the commissioners; and we think that this was all the notice they had a right to require. Of course, the statute goes upon the presumption that, since all the parties cannot be

served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters.

"The owner of real estate, who is a nonresident of the State within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property, by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be a sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. Otherwise the burdens of taxation, and the liability of such property to be taken

under the power of eminent domain, would be useless in regard to a very large amount of property in every State of the Union.

"It is, therefore, the duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is 'due process of law' as applied to this class of cases."

In *Bellingham Bay & British Columbia Rd. Co.* v. *New Whatcom*, 172 U. S. 312, the notice of a local assessment was published for three successive days, and the hearing was had ten days after the last publication of the notice, making only 13 days in all; yet the proceedings were upheld. In that case the court said, page 318:

"It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of notice is to secure to the owner the opportunity to protect his property from the

lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard. And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections. Here no question is made of the form of the notice. It was published in three successive issues of the official paper of the city. So the statute required. What more appropriate way of publishing the action of a city than in its official paper? Where else would one interested more naturally look for information? And is not a repetition in three successive issues of the paper sufficient? How seldom is more than that required? Indeed, we do not understand that any challenge is made of the sufficiency of the publication. But when that is made and is sufficient, notice is given. The fact that the owner after being notified is required to appeal and file his objections within ten days, is thus the sole ground of complaint. But how many days can the courts fix as a minimum? How much time can be adjudged nec-

essary as matter of law for preparing and filing objections? How many and intricate and difficult are the questions involved? Regard must always be had to the probable necessities of ordinary cases. No hardship to a particular individual can invalidate a general rule."

In *Falbrook Irrigation District* v. *Bradley*, 164 U. S. 112, the act provided (p. 121):

"Sec. 20. On or before the first Monday in August in each year, the assessor must complete his assessment book and deliver it to the secretary of the board, who must immediately give notice thereof, and of the time the board of directors, acting as a board of equalization, will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district. The time fixed for the meeting shall not be less than twenty nor more than thirty days from the first publication of the notice, and in the meantime the assessment book must remain in the office of the secretary for the inspection of all persons interested."

Upon this statute the court says (p. 175):

"Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer*

v. *Merchant,* 125 U. S. 345, 356, and *Walston* v. *Nevin,* 128 U. S. 578. Such a hearing upon notice is duly provided for in the act."

In *Goodrich* v. *Ferris,* 214 U. S. 71, the statute provided for notice of an application for distribution of a decedent's estate by posting, and it was held that a posting of the notice for ten days was sufficient, and that the appeal to the 14th Amendment was merely frivolous, the court saying (p. 81):

"As held in *Bellingham Bay Co.* v. *New Whatcom,* 172 U. S. 314, 318, even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain 'that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.'

"The jurisdiction to determine this appeal upon the merits being dependent upon the existence of a constitutional question in the record, and the mere averment that such a question was raised below not being sufficient where the alleged Federal question is so wanting in merit as to cause it to be frivolous or without any support whatever in reason, it follows that the appeal must be and it is *dismissed for want of jurisdiction.*"

In *Christianson* v. *King County,* 239 U. S. 356, an estate was escheated because no heirs

appeared after a notice for four weeks — the exact length of the notice here — and it was held that the heirs were forever barred, the court saying (p. 373).

"It is apparent that there was no deprivation of property without due process of law. The court, after appropriate notice, did determine that there were no heirs and its decree being the act of a court of competent jurisdiction under a valid statute, bound all the world, including the plaintiff in error. It cannot be regarded as open to attack in this action."

In *Secombe* v. *Railroad Co.*, 23 Wall. 108, the statute provided for a notice published four weeks—the same as here—before lands could be condemned for a railroad's right of way, and it was upheld. The court uses the following language (p. 119):

"The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction."

Similar periods of limitation for complain-

ing of assessments had often been sustained by the Supreme Court of Arkansas.

Board of Improvement v. *Pollard*, 98 Ark. 544.

Burrus v. *Board of Improvement*, 134 Ark. 14.

Vietz v. *Hazen, LaGrue & Slovak Rd. Imp Dist.*, 139 Ark. 567.

Sikes v. *Douglas*, 147 Ark. 469.

McCord v. *Welch*, 147 Ark. 363.

Ingram v. *Thames*, 150 Ark. 443.

Road Improvement Districts v. *Crary*, 151 Ark. 484.

Desha Road Imp. Dist. v. *Stroud*, 153 Ark. 587.

The plaintiff was therefore bound to know that she must be on the watch for such notices, and prompt to act upon their publication.

Plaintiff relies upon the case of *Roller* v. *Holly*, 176 U. S., 398, in support of her contention that the notice given by the district did not constitute due process of law. In that case, however, there was no attack upon the constitutionality of the statute involved, and this court took all of the facts of the case into consideration in reaching the conclusion that five days

was not a reasonable notice. We quote from the opinion:

"Without undertaking to determine what is a reasonable notice to nonresidents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return. that five days was not a reasonable notice, or due process of law; that the judgment obtained upon such notice was not binding upon the defendant Roller, and constitutes no bar to the prosecution of this action."

It will be seen that the court was influenced in reaching its decision by the fact that the defendant, Roller, was served with notice in Virginia to appear in Texas within five days. The determining element in the case was the great distance between the residence of the defendant and the court before which he was cited to appear. That was a suit between individuals for the foreclosure of a lien. But here we have a case involving the exercise of the taxing power by a state, and under the decisions of this court, as illustrated by the quotation from *Huling* v. *Kaw Valley Ry. & Imp. Co.*, 130 U. S., 559, *supra,* the residence of the property owner is of no importance. The question could be raised as appropriately by a land owner who resided in Morrilton and had never been beyond the limits of Conway County, as by the present plaintiff.

It is true that the Circuit Court of Appeals for the Eighth Circuit in the case of *Thornton* v. *Road Improvement District No. 1,* of Clark County, 291 Fed. 518, 528, speaks slightingly of a similar notice because it was published in the local paper. But if not there, where must such notices be published? Such papers may be small and of limited circulation; but they are the papers to which the property owner would naturally look for legal notices affecting his lands. Their limited size makes it peculiarly easy for the property owner to find anything affecting his interest. The nonresident has only to subscribe for the local paper, and a glance at its columns suffices to inform him whether there is any movement on foot that may involve his property. Such notices published in a metropolitan journal would be easily overlooked. It is the universal policy to require their publication in the local papers, and we can conceive of no reason for changing it. In the opinion in that case the court comments on the fact that Thornton was a citizen of Illinois, and knew nothing of the publication of the notice in the newspaper in Clark County, Arkansas. Surely the court does not mean that legal notices touching Arkansas lands must be published in Illinois. No owner of Arkansas lands would look to the Illinois newspapers for such notices.

The objection to the form of the notice is

so lacking in merit that it is difficult to treat it seriously.

The act creating the district (Ark. Road Acts of 1919, Vol. I, p. 1028) lays off the boundaries of the district with great clearness. This statute was binding on the plaintiff. She cannot plead ignorance of the law. She is conclusively presumed to have known that her land was in the district and subject to assessment.

The notice, the form of which is set out on page 1041 of said volume, advised her that the assessment of benefits had been completed; that it was on file with the secretary of the district; that a duplicate was on file with the county clerk; that it was open to inspection at either place; it advised her that at the time and place named the commissioners of the district would meet for the purpose of hearing any complaints against the assessment. It was signed by the county clerk in his official capacity, so that any reader of the notice could see that it was a matter that must receive attention.

The only defect that the plaintiff's counsel can suggest is that it does not describe her land nor inform her of the amount of her assessment. She is conclusively presumed to know the description of her own land and that it is in the district. There could be no advantage in telling her this again. As for the amount of the

assessment, she is advised where she can go for the information, and that is a public office at the county seat.

What plaintiff contends for is that unless the notice prints the entire assessment of benefits, it is not due process of law. Naturally, no authorities are cited to sustain such a position. To print the entire assessment, describing each tract, giving the name of the owner and the amount of the assessed benefits, involves such enormous expense that it is rarely required or sanctioned by the law. If that is necessary, then at least 99 districts out of every 100 are absolutely void; for the short form of notice provided by the statute in this case is almost universal.

THE AMOUNT OF THE ASSESSMENT IS NOT NOW OPEN TO QUESTION.

Where the assessment of benefits is not made by the legislature, but by a tribunal which it creates, every landowner has an absolute right to be heard on the question of its justice. But the 14th Amendment secures to him only one such opportunity. If that is afforded, and he does not avail himself of it, he is forever bound by the judgment of the equalizing tribunal.

Here the plaintiff has had her opportunity. The statute provides for a notice such as this

court has many times held to be due process. Notice was given according to the statute. The commissioners met at the time and place named, and heard all complaints. The plaintiff did not appear. When the commissioners had equalized the assessment and adjourned, the plaintiff still had ten days in which to appeal to the courts. She did not do that. It is now too late for her to complain that her assessment was unjust, or even that it was confiscatory.

As was said by this court in *Milheim* v. *Moffat Tunnel Improvement District*, 262 U. S. 723:

"These landowners did not seek to have the Commission modify or correct this tentative basis of apportionment or file any objections to the appraisal of benefits to their properties. Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. Having failed to object to the tentative *ad valorem* basis adopted by the commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint. Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assess-

ments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessments as unconstitutional."

So, in *Farncomb* v. *Denver,* 252 U. S. 7, it was held:

"As construed by the Supreme Court of Colorado, Sections 300 and 328 of the charter of the City and County of Denver, gave property owners an opportunity to be heard before the board of supervisors respecting the justice and validity of local assessments for public improvements proposed by the park commission, and empowered the board itself to determine such complaints before the assessments were made.

"Parties who did not avail themselves of such opportunity cannot be heard to complain of such assessments as unconstitutional."

A similar rule was laid down in *Campbell* v. *Olney,* 262 U. S. 352.

This is the construction given to similar acts by the Supreme Court of Arkansas.

In *Bush* v. *Delta Road Improvement District,* 141 Ark. 254, that court says:

"As we have already seen, under the provisions of the present act, it is provided that the commissioners shall make the assessment of benefits, and that due notice thereof be given to

the property owner in order that he may be heard. This is the time and place for the property owner to show that his property is not benefited at all or that it is taxed so high as to amount to a confiscation of it."

The plaintiff has therefore sinned away her day of grace, and she cannot now complain that her assessment is unjust or even that it is confiscatory.

Even if the plaintiff had applied to the court within the time allowed her by the statute, this court would not overrule the judgment of the assessors. They have a knowledge of local conditions which this court cannot possess. It is only where the assessment is plainly and demonstrably unjust that this court has ever interfered. It is needless to review at length the few cases in which this court has set aside the assessors' judgment.

In *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, a rocky island in the sea was taxed to drain swamps upon the mainland.

In *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, it was a mathematical certainty that the plaintiff was being robbed.

In *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6 of Little River County*, 256 U. S. 658, the railroad was assessed

$67,900 for a gravel road paralleling its line for a distance of 11.2 miles, and probably doing it more harm than good.

In *Thomas* v. *Kansas City So. Ry.*, 261 U. S. 481, 57 per cent of the cost of reclaiming swamp lands on the line of a railroad was levied against it, and only 43 per cent upon the landowners, who would be the only real beneficiaries.

No such outrageous abuse of power is now before the court. There is nothing to indicate that the commissioners did otherwise than exercise an honest judgment. They based their assessment of benefits on the county and State assessment for purposes of taxation, modified by zones according to accessibility to the highway to be constructed.

The commissioners were justified in relying upon the values appearing on the county and State assessment. It was made by officers chosen by the people and sworn to assess honestly and justly. The property owner was given notice and an opportunity to be heard before the assessment became final. Even then, if the property owner was dissatisfied, he could appeal to the county court, thence to the circuit court, and finally to the Supreme Court of the State.

We know the rule of this court requiring that provisions of State Constitutions and statutes referred to shall be set out at length;

but we cannot believe that this court desires that this brief should be encumbered by a copy of the entire assessing system of the State of Arkansas, particularly as we are sure that adverse counsel will not challenge our statements.

It is difficult to see how there could be greater safeguards thrown around the taxpayer than are afforded by the Constitution and statutes of Arkansas. Of course, no assessment will meet the views of everybody. It is a mere estimate of values, and the judgment of different men as to values will differ, even when those men are most competent and best informed. Still, the county and State assessment, made in this manner, is probably as close an approximation to abstract justice as can be attained.

The propriety of using the State assessment as the basis of the benefit assessment was affirmed in the case of *Valley Farms Co.* v. *Westchester County,* 261 U. S. 155, where this court held:

"Where the State law gives the property owner an opportunity to be heard upon the valuation of his property for general taxation, he is not entitled under the amendment to a further hearing on that subject when such valuations are used as bases for apportioning special assessments."

The practice of dividing the lands into zones in proportion to its accessibility to the highway and the probable use thereof by the dwellers on the land has been approved by this court in *Embree* v. *Kansas City Road Dist.*, 240 U. S. 243, where it was held;

"A legislative act establishing zones of benefits with graduated ratings for assessments in districts lawfully created does not deny due process of law where it does not provide for a hearing on this particular feature, unless the legislative apportionment is so arbitrary and devoid of any reasonable basis as to amount to an abuse of power."

All lands between the highway and the Arkansas River—all plaintiff's lands lay in that region—were placed in the first zone because their only practical outlet was over this road. To the south there was a broad and impassable river, so that every person who went to or from the plaintiff's lands must traverse the road built by the district. Those lands were therefore placed in the foremost zone.

Plaintiff says that some of her land is untillable because of swamps and overflow; but swamps can be drained and overflow water can be turned back by levees. As was held by the Supreme Court of Arkansas in *Wilkerson* v. *St. Francis County Road Improvement District No. 1*, 141 Ark. 164:

"Assessments of lands in a road district on a zone system at so much an acre depending upon their proximity to the road are not subject to judicial review because such assessments are not based upon the relative valuations of the lands assessed."

In that case the court said, page 169:

"There is testimony that much of the land owned by appellant received an assessment greater than its present market value. These were lands shown to be of small value chiefly because of the recurring overflows from the L'Anguille River, which winds its tortuous course through them. It is not shown or contended that these lands are beyond reclamation by drainage or by levees, and it is a matter of such common knowledge that courts may know it that levees and drains have passed beyond the experimental stage."

As this court has so often expressed its reluctance to interfere with the systems of local improvements of the several States, this case is properly cited as a most persuasive authority.

In *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 203, this court says:

"Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely

doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot."

So, in *Kelly* v. *Pittsburg*, 104 U. S. 78, this court says, on page 80:

"The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest."

And again on page 82:

"It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as com-

pared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?

"Clearly, however, these are matters of detail within the discretion, and therefore the power, of the lawmaking body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law."

The assessment of benefits was based on the State and county assessment for 1917. After the notice of the hearing was published and before the hearing was had the 1919 assessment was filed. This reduced the value of the plaintiff's lands from $43,030 to $30,320. There is, however, no legal presumption that the assessment of 1919, which had merely been filed, but which had not become final, was more accurate than that of 1917. To have adopted the 1919 assessment as the basis of the assessment of benefits was impossible. It would have necessitated the making of an entirely new assessment of benefits. This the board had no power to do. When its assessment of benefits was filed and notice

given, the property owners had a right to inspect it, and determine whether they would appear on the day named, to contest its fairness. Many of them no doubt did so, and were satisfied. To leave their property on the basis of the higher 1917 assessment while reducing the plaintiff's to the lower 1919 assessment would be gross injustice bordering on fraud. For aught that the record shows, all the property in the district may have been reduced in the 1919 assessment in the same proportion as the plaintiff's.

ESTOPPEL.

The record shows that shortly after the confirmation of benefits the district issued its bonds which were sold on the market, and that with the proceeds it had almost finished the road before the plaintiff brought this suit.

The act informed her that the road was to be built, and she stood by until it was nearly completed before taking action. She says that the first knowledge that she had of the existence of the district was in January, 1921, when she applied to pay her taxes, and found the road tax upon the list. Even then she did nothing until the bringing of this suit on May 26, 1921, four months after receiving personal notice. In the meantime the road building continued.

Upon the clearest principles she is estopped now to attack the assessment of benefits, on which the bondholders and contractors must rely for the payment of their debts.

In *Tulare Irrigation District* v. *Shepard*, 185 U. S. 1, this court held:

"The Tulare irrigation district, in California, issued and sold its bonds for the purpose of constructing its irrigation works. The proceeds were used for that purpose by the corporation, and the works were by means thereof constructed. The corporation then refused to pay the bonds, and denied its liability on them upon the ground that it was never legally organized as a corporation, and hence had no legal right to issue any bonds. *Held*, on the authority of *Douglass County Commissioners* v. *Bolles*, 94 U. S. 104, that common honesty demanded that a debt thus incurred should be paid; and that there was nothing in the facts in this case to set aside the application of that principle; that if anything could constitute a *de facto* corporation the defendant is one and that, being thus a *de facto* corporation, none but the State can question its existence.

"Under the circumstances stated in the opinion of the court, the landowner is estopped from setting up the defense of the want of notice, as against the plaintiff in this case."

And in *Shepard* v. *Barron*, 194 U. S. 553, it was held:

"Where a public improvement is completed, and the assessment made at the instance and on the petition of the owners of the property, and pursuant, in form at least, to an act of the legislature of the State, and in strict compliance with its provisions, and with the petition there is an implied contract that the parties, at whose request and for whose benefit the work was done, will pay for it in the manner provided for by the act, and after completion of the work they cannot set up the unconstitutionality of the act to avoid the assessment.

"An assessment made under such circumstances does not deprive the owners of their property without due process of law nor take their property without just compensation.

"There are circumstances under which a party who is illegally assessed may be held to have waived his remedy by conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality."

This is in accordance with the rule as it exists in Arkansas.

Thus in *Fitzgerald* v. *Walker,* 55 Ark. 148, 155, the court says:

"But, conceding that the price complained of her was so extravagant as to entitle the plaintiffs to avoid the contract on that ground, their application for relief was not timely. The contract was entered into on the 15th day of March, 1888, and the work done under it was accepted by the board on the 22d day of December of the same year. This suit was begun on the 12th day of February, 1890."

There are various other cases in the Arkansas reports to the same effect. The last is *Road Improvement District No. 1 of Independence County* v. *Delinquent Lands,* 158 Ark. 58, 61, where the court says:

"We are of the opinion that the allegation that the sale of the bonds was void does not constitute any defense to the action to collect assessments. It is undisputed that the district constructed the improvement as provided by statute, and that the district is liable for the cost of the improvement. It is unimportant to determine, in this case, in what way that liability shall be enforced. The district has received the benefit of the construction of the improvement and must pay for it, even though it should be held that the bonds were illegally sold. The case falls within the principles

announced in the following cases: *Fitzgerald* v. *Walker,* 55 Ark. 148; *Altheimer* v. *Board of Directors,* 79 Ark. 229; *Forrest City* v. *Bank of Forrest City,* 116 Ark. 377; *Hitchcock* v. *Galveston,* 96 U. S. 341."

Respectfully submitted,

LASKER EHRMAN,
CHARLES T. COLEMAN,
G. B. ROSE,
D. H. CANTRELL,
J. F. LOUGHBOROUGH,
A. W. DOBYNS,
For Defendants in Error.

(13)

Office Supreme Court, U.
FILED
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WM. R. STANSBU
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 92.

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT No. 2 OF CONWAY COUNTY ET AL., DEFENDANTS IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

Estoppel.

Attention is called to the following language of the complaint (Tr., 10):

> "The first information plaintiff had of the passage of said Special Act 245 and the assessment of benefits against her land was in January, 1920, when she wrote to ascertain the amount of her taxes for the year 1919. That, in order to avoid the penalties

which would be incurred against the lands, she paid to the defendant district the sum of $1,516.10 under protest."

Plaintiff did not bring this suit until May 24, 1921, a year and five months after she had actual knowledge. A clearer case of laches could hardly be imagined.

Plaintiff says that the case went off largely on demurrer, and that there is in this record no proof that the district had issued bonds. But in her complaint (Tr., 11) she prays "that said district be restrained from selling *any other bonds* until the defendant district properly presents plans and specifications," etc.

This is a clear admission that bonds had been issued as stated in the answer (Tr., 17).

Respectfully,

LASKER EHRMAN.
G. B. ROSE.
D. H. CANTRELL.
J. F. LOUGHBOROUGH.
A. W. DOBYNS.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted]93

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 5, OF CONWAY COUNTY, ARKANSAS, AND R. E. BARTLETT, SHERIFF OF CONWAY COUNTY, ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED JUNE 22, 1925

(29,694)

(29,694)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 384

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 5, OF CONWAY COUNTY, ARKANSAS, AND R. E. BARTLETT, SHERIFF OF CONWAY COUNTY, ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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[fol. 1] **IN THE SUPREME COURT OF ARKANSAS**

MRS. M. L. HOUSE, Appellant,

vs.

ROAD IMPROVEMENT DISTRICT #5 OF CONWAY COUNTY, ARKANSAS, et al., Appellees.

STIPULATION AS TO CONTENTS OF RECORD—Filed June 12, 1923.

It is stipulated that the record herein, excepting an issue for consideration presented by the plaintiff in the event that the federal questions raised were decided against her, consists of the following:

1st. The complaint:

2nd. Amendment to conform to the proof:

3rd. Additional amendment to conform to the proof:

4th. Demurrer and answer:

5th. Demurrer and answer to the amendment to the complaint:

6th. The evidence material to the federal questions other than those determined by the demurrer was:

(a) That the Notice described in the complaint which was considered by the Court in passing upon the demurrer to the complaint was as follows, to-wit:

"Notice of the Assessment of Benefits in Road Improvement District No. 5 of Conway County, Arkansas

Notice is here given that the assessment of benefits and damages in Road Improvement District No. 5 of Conway County, has been completed and is on file with the Secretary of said Commissioners, and is open to inspection and a copy of said assessment of benefits and damages is on file in my office and is open to inspection and that the said Commissioners for said District will on the 12th day of August attend at the County Court House of Conway County, for the purpose of hearing any complaint upon any of said assessments of benefits or damages. Any complaint of any of said assessment of benefits or damages must be filed with the secretary of said commissioners in writing before the date of hearing.

[fol. 2] Witness my hand and seal of said court, this 21st day of July, 1919.

J. L. Williams, Clerk. (Seal.)

(b) Testimony was offered by the plaintiff tending to sustain each allegation of the complaint and amendments thereto, and

testimony was offered by the defendant tending to sustain each allegation of the answer; said testimony was taken in the form of depositions and duly filed before the trial and at the trial the demurrers were first heard and were sustained as to all allegations of the complaint and amendments thereto, except as to two issues, to-wit:

First. That the Shaw's Bridge lateral was abandoned.

Second. That the Legislature acted arbitrarily in including plaintiff's land in the District and excluding said other lands alleged to be specially benefited.

All other issues presented on the complaint and amendments thereto were determined upon the demurrers.

It is stipulated that the testimony as to the abandonment of the Shaw's Bridge lateral was conflicting, and the Chancellor held that it was not aban-oned and the Supreme Court has sustained that finding, and the plaintiff does not desire to preserve her evidence upon that issue.

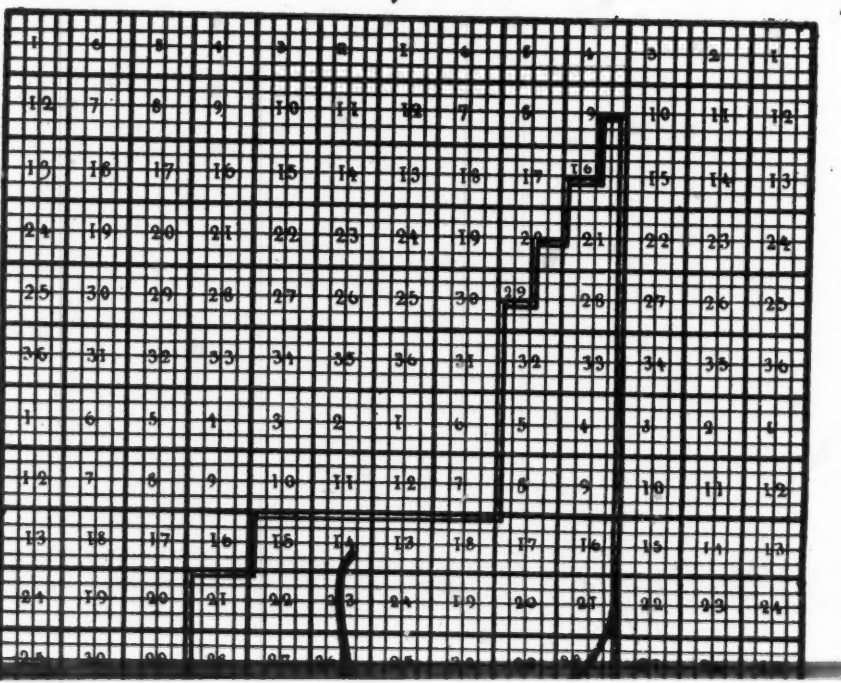
The testimony introduced by the plaintiff and heard by the Chancellor on the second issue above referred to as to the arbitrary action of the Legislature was in substance as follows:

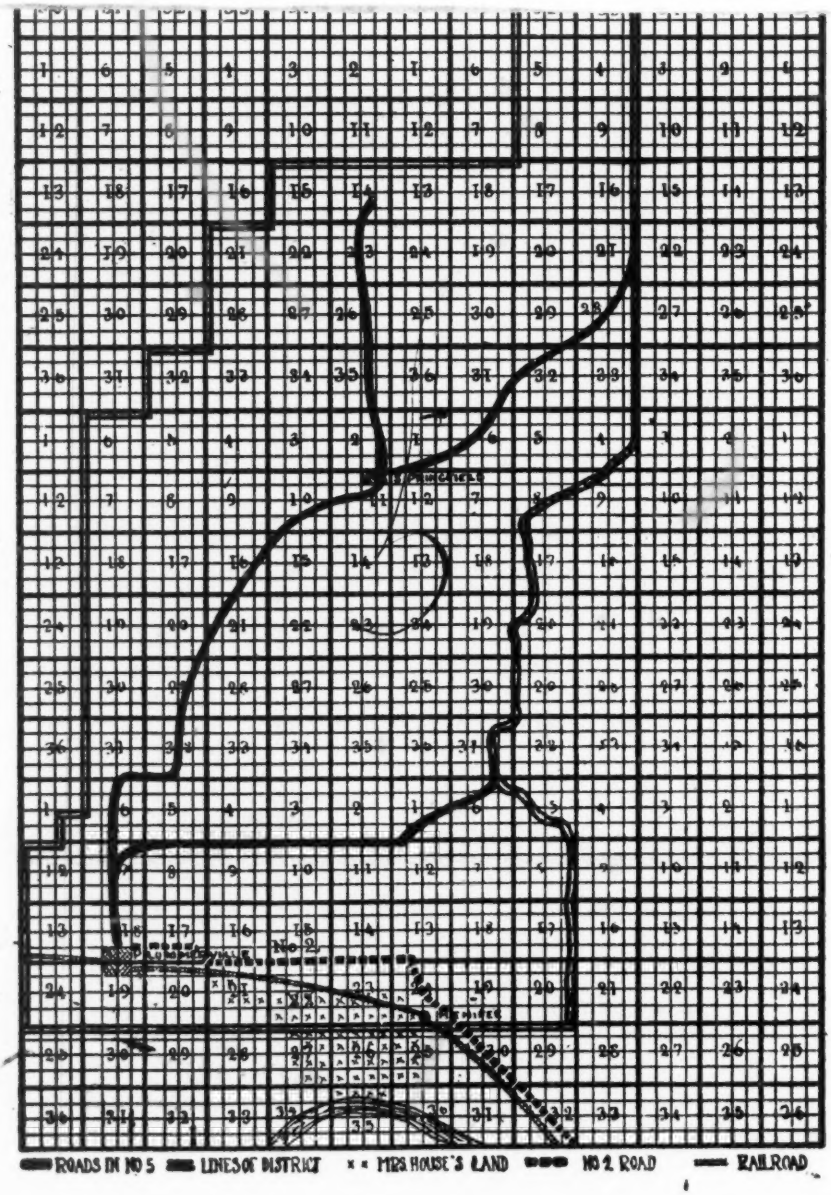
(Here follows Exhibit A to Stipulation, marked page 2½.)

[fol. 3] A map was introduced in evidence showing the lines of the District and the roads to be improved therein: a reduced copy of it is attached as "Exhibit A" and explanatory evidence of said map to the effect that the physical conditions on either side of the improved road were similar, and that the physical conditions southeast of Plummerville were the same as at an equidistant southwest thereof, and testimony was adduced tending to show that the plaintiff's lands in sections 21 and 22, Township 6 North, Range 15 West, were separated from the improved roads, the nearest point upon the improved roads being the town of Plummerville, by Gap Creek and cypress brakes and swamps.

That the only practical route of travel from said sections 21 and 22 to reach Plummerville is to pass without the District and to go south into section 28 and then strike a road leading into Plummerville, through said section 28 and through section 29 and section 30, which said sections 28, 29 and 30 are out of the district and pass back into the district in section 19, in which Plummerville is situated, or go south without the district into section 28, and strike another road leading east through sections 28, 27 and 26 to Menifee, which said sections 28, 27 and 26 are without the district and from Menifee to travel the public road of District No. 2 into the town of Plummerville and then reach the improved road of District No. 5; that there is no feasible or practicable route, owing to the topo-

✓ Exhibit A to Stipulation. 2½




No 2
ROADS IN NO 5
LINES OF DISTRICT
MRS HOUSE'S LAND
NO 2 ROAD
RAILROAD

graphy of the land and the physical condition of the creeks, brakes and swamps, to reach the improved road in District No. 5 from said sections 21 and 22, without excessive expense in bridging and constructing embankments, other than through said routes aforesaid. A map of said district, which was introduced in the trial of this cause, is attached hereto and marked Exhibit "B."

[fol. 4] That testimony was introduced by defendant district tending to controvert testimony offered by Appellant on this issue that the Chancellor decided this issue in favor of the district, but the Supreme court in passing on same, has this to say:

"The south boundary line of said District No. 5 is the south line of sections 19, 20, 21, 22, 23, and 24 in tp. 6 N., range 15 W., in Conway County. A part of appellant's lands were located in section 21 in said district. Appellant alleged and made proof that, on account of Gap Creek and cypress brakes, the only practical route from said lands in section 21 to the improved roads in said district is to cross the south boundary line thereof and pass over lands not included in the district, and a part of which was nearer the improved road than appellant's lands. Appellant argues that this situation invalidates the act creating the district under the rule announced in Heinemann v. Sweatt, 130 Ark. 70, and subsequently approved in Milwee v. Tribble, 139 Ark. 574; Johns v. Road Imp. Dist., 142 Ark. 73, and Ruddel v. Rutherford, 143 Ark. 49. The rule announced in those cases is that when it appears, from the face of the act creating an improvement district, or from conditions or situations of which the court will take judicial knowledge, that lands of complaining owners are entirely separated from the roads to be improved by intervening lands excluded from the district, or by impassable obstructions or barriers, the inclusion of the lands thus separated renders the act void because arbitrary and discriminatory. In the instant case the act itself, nor any impasse of which this court will take judicial notice, separates appellant's lands in section 21 from the improved roads in the district. On the contrary, none of the lands embraced in the district, according to the face of the act and such facts as this court judicially knows, are [fol. 5] separated from the improved roads by an impasse or intervening excluded lands. The Ruddell case, supra, which, learned counsel so earnestly insist, controls the case at bar, is not applicable because the impasse in that case was an island and navigable stream, of which this court took judicial notice. The only obstructions between appellant's lands in section 21 and the improved roads in said district are a small creek and cypress brakes, of which this court takes no judicial notice."

7th. The decree of the Conway Chancery Court.

8th. All proceedings of the Supreme Court, including the motion for rehearing and the opinion of the court and the dissenting opinion.

Given under our hands this 8th day of June, 1923.
Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Appellant.
J. W. Johnson, Attorney for Appellees.

[File Endorsement Omitted.]

[fol. 6] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS, FEBRUARY TERM, 1922, APRIL 19, 1922

[Title omitted]

Pleas Before Hon. W. E. Atkinson, Judge of the Ninth Chancery District

Appearances: Jos. M. Hill, for plaintiff; J. W. Johnston, for defendant.

CAPTION

Be it remembered that on the 19th, day of April 1922, the same being an adjourned day of the February 1922, term of the Chancery Court of Conway County, Arkansas, The Honorable W. E. Atkins, regular judge of said Court present and presiding. The following proceedings were had in the above entitled cause, to-wit:

[fol. 7] IN THE CHANCERY COURT OF CONWAY COUNTY

[Title omitted]

COMPLAINT IN EQUITY—Filed & Summons Issued May 26, 1921

Comes Mrs. M. L. House, plaintiff herein, and complains of the defendants, Road Improvement District No. 5 of Conway county and R. E. Bartlett, Sheriff of Conway county, and for her cause of action states:

That she is and has been for the past four years resident of the City of Washington, District of Columbia, and was during all the times in this complaint mentioned.

That she owns in the defendant district lands which were assessed as 960 acres. There is a description of the lands of hers assessed in said District, together with the distance of each tract from the road improved in said District and the assessed value of the same and the assessment of benefits of the same hereto attached and made a part of this complaint and marked "Exhibit A." That said lands are assessed at $15,780.00 and the benefits assessed for the improvement of the road to be improved in said defendant district at $15,780.00. which is to be paid in twenty annual installments of $946.80 amounting in all to $18,936.00.

The General Assembly in 1919 at its regular session passed Act 245 creating road district in Conway County, Arkansas, including the

[fol. 8] defendant road district, which said Act was approved on March 11, 1919. That said Act was a local and special Act and the notice of the intention to apply therefor was not published in the locality where the lands to be affected were situated thirty days prior to the introduction of the Act in the General Assembly and no evidence of such notice was exhibited to the General Assembly before said Act was passed and said Act was unnecessary as a general law providing for the creation of road district was in force and could have been made applicable. The plaintiff alleges that said Act was passed in contravention to Sections 25 and 26 of Article V of the Constitution of 1874.

The plaintiff does not allege that said Act was void on account of the non-compliance with the provisions of the Constitution and alleges materiality of this allegation is on the subject of notice to her of the proceedings under said Act by which a lien was created against the property in favor of the defendant district without her knowledge and alleges that if the provisions of Section 26 had been complied with, she would have had better opportunity of ascertaining the proceedings against her land and alleges that if proceedings had been had under general law that she would have had more full and ample notice of such proceedings than is provided in said special Act No. 245.

Plaintiff alleges that she had no information whatever of the passage of the General Assembly of Act No. 245 until long after proceedings under that Act had fixed a lien upon her property as hereinafter stated. That said Act provides that the Commissioners of [fol. 9] the defendant district should make plans for the improvements contemplated in said Act and an estimate of the cost thereof and file the same with the county clerk and that immediately thereafter the clerk shall give notice by publication once a week for two weeks in some newspaper published in the county designating the date when the county court will be in session for the submission of said plans, and that the last insertions of said notice to be not less than five days before the consideration of the plans by the county court.

The said Act makes it the duty of the county court on said date to consider said plans and hear any landowner interested therein, and to pass upon and adopt said plans or modify the same and when approved by the county court they shall be the plans of the district.

That the defendant district proceeded thereunder to form said plans and filed the same with an estimate of the cost thereof and gave a short notice for interested parties to appear, which said notice was less than twenty days, and said plans were approved by the county court on July 19th, 1919.

That said Act provided that immediately after the approval of the plans by the county court, the commissioners should proceed to make an assessment of benefits to be received by each tract of land in the district and that the assessments list containing the same should remain in the custody of the Commissioners and a copy should be filed with the county clerk.

That on the day the plans were approved the Commissioners filed [fol. 10] the assessment on July 19, 1919, the county clerk issued a notice in the form prescribed in said Act #245, dated July 19, giving notice that said assessment was on file with the Secretary of the Commission and a copy of it in the county clerk's office, open to inspection, and that the Commissioners would on the 12th of August, attend at the Court House in Morrillton, Conway county, Arkansas, for the purpose of hearing any complaint upon said assessment of benefit, and that the complaint of any assessment must be filed with the Secretary of the Commission in writing before the date of said hearing. That said notice was published in the Conway County Unit, a newspaper published in said county on July 23 and on July 30th, August 2, August 6 and August 12th, the last three being within ten days of the date and not to be reckoned the plaintiff to file her objections to the assessment of benefits on her land on or before August 11, 1919, and that the first publication being on July 23rd, under the rule for computation in Section 9756 of Crawford & Moses Digest there was but 18 days actual notice given and the said notice was in compliance with said statute.

Plaintiff alleges that said section 20 of the said Act requires the commissioners after the approval of the plans by the county court to proceed to make an assessment of benefits to be received by each tract of land, or parts of land and all other real property within the district and to describe the same in a book in which all of the lands shall be shown and shall show opposite each tract in said book the assessment of benefit against each tract.

[fol. 11] The name of the supposed owners shall be shown opposite the several tracts. Said sections requires that this book shall be kept by the Commissioners and a copy thereof filed with the county clerk for inspection of all persons interested therein and the notice given thereunder states that said assessment is to be found in the county clerk's office. That said Commissioners did not comply with said section of said Act and did not set down the description of the real estate in said assessment book but merely set down names of the owners and opposite the names a valuation, and opposite that an assessment of benefits without filing in the said book the property assessed. That said assessment would not give information to the land owners of their property assessed and was not a compliance with the statute and the same was a jurisdictional requirement of the statute and the notices based thereupon was void and of no effect. That since this matter was investigated by the grand jury, said assessment list has been filled in, but it was not filled in until long after the notice thereof was given.

The plaintiff alleges that she had no actual notice of this proceeding, saw no copy of the newspaper and had no*t* information whatever as to the creation of the district, or of the proceedings of the Commissioners in adopting plans, the orders of the court in approving the same, nor the proceedings of the Commissioners in assessment of her lands with benefits for the construction of the improvement until long after said dates when such proceedings were had.

That said Act in Section 21, authoritizes any person who has

complained in writing of his assessment of benefits and who feels [fol. 12] aggrieved by the action of the Commissioners after the hearing and any other person whatsoever who may have any objection to any assessment of benefits or the proceedings under the Acts or of the action of the commissioners to file his complaint thereof in the chancery court within ten days after hearing by the commissioners herein provided for, which was on the 12th day of Aug. 1919.

That the plaintiff had no knowledge or information of said hearing, constructive notice of which only was given her and that only for the period of eighteen days for her to file her complaint, did not have the opportunity of availing herself of said remedy, by a suit in chancery within ten days after August 12th.

The plaintiff alleges that she was entitled to due and timely notice before the assessment became a lien against her property of a hearing as to the justice and equity of the same and that she was not given such notice by said constructive notice by the publications aforesaid, the utmost time for which would have been eighteen days and that such purported notice for such short period of time was manifestly insufficient; and that the provisions of the statute authorizing it and as thus carried out by the Commissioners such purported notice amounts to a denial of Justice.

The plaintiff alleges that the assessment of benefits against her land constituting a lien thereon on August 12th, 1919, by virtue of her failure to object to said assessment on said date was the deprivation of her property, contrary to the law of the land as is [fol. 13] guaranteed her by section 21 of Article 2 of the Constitution of 1874, and deprives her of her property without due process of law as is guaranteed to her by Section 8 of Article 2 of the Constitution of 1874.

The plaintiff further alleges that the filing of said assessments against her lands as set forth in "Exhibit A" and the same becoming final and a lien upon her property on August 12, 1919, on account of her failure to file in writing here objections thereto, on or before August 11th, 1919, as provided in said Act or notice, and that the only notice of such proceedings authorizing said lien to be created was the publication of the notice hereinbefore set out, to-wit: the publication of said notice in the Conway County Unit, on July 23, and July 30th, and that such notice was not such notice as is required to constitute due process of law within the meaning of the 14th Amendment to the Constitution of the U. S.

And the plaintiff alleges that the act of the defendant district acting under and in pursuance to the statute of the General Assembly of Arkansas referred to-wit: Act #245 of 1919, amounted to the State through such agencies depriving the plaintiff of her property without due process of law and such proceedings is void as in conflict with the said 14th Amendment to the Constitution of the United States and the plaintiff sets out and relies upon the same as her cause of action in praying the court to declare void the assessment against her property made final by said Act and such proceedings [fol. 14] on said 12 day of August, 1919.

Plaintiff further alleges that having no notice in fact of said proceedings of August 12, 1919, she had no opportunity to take an appeal within ten days thereafter as provided in Section 21 of said Act, that she might have taken had she known of said proceedings, and alleges that during said ten days she was residing at her home in the City of Washington, in the District of Columbia, and had no knowledge or information of any of said proceedings until long thereafter.

Further complaining the plaintiff alleges that she was entitled to a reasonable notice constructively, if not actually, before a lien could legally be created against her land for said assessments, and that creating said lien on August 12, 1919, as hereinbefore set out was itself a deprivation if her property right without due process, contrary to the provisions of the State Constitution and of the 14th Amendment to the Constitution of the United States, and further alleges that if said ten day period therein provided for bringing suit in the chancery court could be tacked to and counted in the time given her by the law for contesting the assessments that the same would be unreasonably short, amounting to in all, only 28 days of constructive notice before her property was taken, but the plaintiff alleges that said ten days cannot be added to and attacked on the 18 days' notice she was given constructively of said hearing, because said notice did not give information that such lengthened time would be given, on the contrary said notice stated that "Any [fol. 15] complaint of any of said assessment of benefits or damages, must be filed with the Secretary of said Commissioners in writing before the date of said hearing," thereby affording only notice of that which it gave, which was of this hearing on August 12th and said notice did not give any information of the creation of said district by special Act of the General Assembly.

The plaintiff alleges further that the notice prescribed in Section 20 of said Act 245 is insufficient on its face to constiute notice to the plaintiff and other landowners of the assessments made against their property. That said notice does not give the names of the owners of the land, nor a description of the land, nor any reference to any act of the Legislature, proceedings of court, or any other source of information by which those reading and receiving the notice would be notified that their lands were within the district assessed.

That the notice given of the filing of the plans of the road improvement required by Section 18 does not impart information of the lands affected by the said plans and gives no reference to any act, map, or order of court by which the lands to be affected by the purported improvement could be identified.

That said Act itself did not name any date for hearing leaving said hearing as to plans and as to contesting assessments to be given by the Clerk of the county court and prescribed a form which was insufficient to give the necessary information, so that said notice, even if duly published — for sufficient length of time to constitute due process of law.

[fol. 16] That the only source of information of existing said

Act was from an examination of Acts passed by the General Assembly in the office of the Secretary of State. That the said Acts were not printed and distributed and given circulation until long after the things and matters herein complained of occurred.

That said Act itself being passed contrary to the Constitutional provisions that notice should be given of its introduction should of itself constitute no notice.

Plaintiff alleges that the notices given by the Commission of the defendant's district were in conformity to said Act and disclosed no further information than is prescribed in the Act to be disclosed and which, as alleged, is insufficient to constitute such notice as is required by due process of law before a lien can be legally created against the plaintiff's property.

The plaintiff states that the notice for the hearing of complaints against the assessment called for a meeting of the Commissioners on the 12th day of August, at the Court House, in the City of Morrilton, and she is not informed as to whether said meeting was held or not, alleges on information and belief that it was not, and asks that the defendant be required to make proof on this subject.

The plaintiff alleges that said notice was insufficient to meet the requirements of the State Constitution as to due process of law and proceedings conformable to the law of the land and is insufficient to meet the requirements of the 14th Amendment to the Con-
[fol. 17] stitution of the United States forbidding any State or any agency of the State to take property without due process of law.

The plaintiff alleges that as a non-resident of Arkansas and a resident of the District of Columbia, she was not chargeable with notice of the special Act passed by the Legislature contrary to the Constitutional provision *of* previous notice of its introduction, and her ignorance of said law was a mistake of fact of which equity should give relief.

Plaintiff alleges that the aforesaid assessment of benefits against her property was excessive, unreasonable and discriminatory, for which she is entitled to relief in equity for the following reasons, to-wit:

That the commissioners of the defendant district in assessing the benefits took as a basis therefor the valuation on the tax books of 1917, assuming that all property was assessed in the tax books equally, because they had been equalized by the Board of Equalization, as a basis for the assessment of benefits and divided the land into six zones according to the distance from the road, but classed all of the land which was in another district as in the 6th zone. The land of the plaintiff is assessed at 100% of its taxable valuation in said district, that the plaintiff owned a body of land originally consisting of 3,217 acres, but which was reduced by encroachments of the Arkansas River to about 2,900 acres, of which 930 acres is in the defendant district. That upon her entire tract there had been valuable cypress timber and in the year 1903 she sold timber from the
[fol. 18] entire tract for the sum of $35,000 and gave the purchaser ten years to cut the same and that said timber was all cut from her lands by the year 1915, and its value decreased by the extent of the

sale of her cypress timber thereon, notwithstanding this fact the assessment of 1917 carried her lands at the higher valuation originally introduced on account of the valuation timber thereupon. That in 1919, on a showing to the assessor and township Board of Equalization her valuation of the entire tract was reduced to $30,320.00, which reduction was entered of record on June 12, 1919; the assessment theretofore had been $43,030.00.

The land of the plaintiff included in the defendant district bore proportionately said higher valuation; that the assessment of benefits was made and filed in this district on July 19th and notwithstanding plaintiff's land had been reduced approximately 30%, the defendant Commissioners took the higher valuation of 1917 as a basis of the assessment, in this district, on the theory, that it was properly assessed, whereas the assessing officers had reduced the same more than a month prior to the Commissioners of the defendant district using the former valuation. That by reason thereof the plaintiff in the defendant district is assessed on a basis of 30% higher than the other lands in the district and higher than a just valuation thereof, on account of retaining the former values which had been given to it on account of the valuable timber thereon which had long prior to this date been removed therefrom.

That said land of the plaintiff in the district consisting of 960 acres is composed of about 300 acres of good land and comparable to the best land in that vicinity in value.

[fol. 19] About 150 acres in cypress brakes and sloughs and about 400 acres is low, wet bottom land of little value and could be reclaimed only by the expenditures of large sums of money for drainage and levee purpose. That there are no houses or other improvements upon the land of any considerable value; that $1,000 would be an execessive valuation for all the improvements thereon.

That the Commissioners of defendant district did not take into consideration the character and value of the land in assessing the benefits thereupon. That the assessment against her lands *are* grossly discriminatory and in many instances much better lands than here, lying within a levee district and protected from overflows by the levee are assessed for much less than her lands of less value are assessed and the proposed improvements add nothing towards the drainage and protection of her lands.

That other lands immediately adjacent to hers and of like character and value are assessed much lower than hers, and she is discriminated against in said assessments and alleges that she is prepared to show upon the final hearing a gross and inequitable discrimination against her property.

That the first information the plaintiff had of the passage of said special Act 245 and the assessment of benefits against her lands was in January, 1920, when she wrote to ascertain the amount of taxes due for the year 1919. That in order to avoid the penalties which would have been added against her land she paid to the defendant district the sum of $946.80 under protest.

[fol. 20] The plaintiff alleges that she has frequently since learning of the arbitrary and excessive assessment against her property

appealed to the Commissioners of the defendant district for relief; that they have denied the same unto her and notwithstanding these facts the defendant district is attempting to collect against her for the assessments of 1920 the sum of $946.80 and the defendant, R. E. Bartlett, as sheriff of said county has a warrant for the *the* collection of the tax against her land and under the provisions of said Act unless the same is paid in a short time (an extension having been granted on all of the lands for a short time by the defendant district) it will be levied upon.

The plaintiff states that the amount paid for the assessments of 1919 are more than should be justly paid by her for several years. on a fair and equitable imposition of benefits, even if the court should hold that her property is subject to assessment and she prays in the alternate that if the court holds her property is subject to the assessment as having been benefited that on the adjustment of the benefits in said district by the court that she be given credit against future assessments for the amount excessively paid in 1919.

Further complaining this plaintiff alleges that the inclusion of her land in said district is arbitrary exercise of legislative power and is void as such, and further alleges that the assessments of any benefits whatsoever against her land for the construction of improvements provided in said Act is arbitrary and without any just basis as her land situated in said district is not and cannot be benefited by the [fol. 21] improvements provided in said Act. That the improvement provided in said Act is for the construction of a road beginning at the City of Plumerville and running thence in a northeasterly direction to the town of Springfield and continuing in a general northeasterly direction to the Conway-Faulkner county line. Also a road beginning at Springfield and running thence in a general northerly direction and also a lateral beginning about two miles north of Plumerville and running in a generally easterly direction to the Conway-Faulkner county line to Shaws Bridge across Cadron Creek. That Plumerville is two miles distant from her land and the lateral running to Shaws Bridge is also its nearest point two miles north of her land.

That between said lateral and her land lies the main line of the Mo. Pac. R. R. and the public road to be improved in district No. 2 running from Plummerville east to Menifee. That all trade traffic, and other communication from the defendant's land and its vicinity either directly to Plummerville or go to some point on said improved road to reach Plummerville and there is no communication between said lands in business or in any way with the road running north from Plummerville. That the road running north from Plummerville and its laterals is beneficial to the country which they traverse and to the town of Plummerville, but are no benefit whatever to the present or future use of the plaintiff's lands and serves the direct traffic from plaintiff's land; and the imposition of an assessment upon the plaintiff's land results in taking plaintiff's property to pay for improvement to other peoples property and to help construct roads in other parts of the county, which from their [fol. 22] nature and future use would not be used by the owners or

occupants of the plaintiff's lands. That the Commissioners of the defendant district have authorized a bond issue of $363,000 and have sold $260,000 and have paid an excessive and unlawful commission and have only received therefor $207,308.25. That there is an authorized bond issue of $190,000 which has not been sold. That the Commissioners of said district have paid out for attorneys fees $5,630.00, which is an excessive amount to pay for said purpose. That should the court hold that any of plaintiff's land has received any benefits and that she should not be taxed therefor, then as a tax-payer she prays the court that the defendant district be required to account for said excessive fees paid for the bond sales and to attorneys.

Section 11 of Act 245 provides and makes it the duty of the Commissioners to make the improvements authorized as expeditiously and economically as possible and the plaintiff alleges on information and behalf that the Commissioners have not done so and prays that they be required to account to the court for their expenditures and purposes thereof. And prays upon a final hearing hereof that they be restrained from selling any further bonds until an accounting is had of the economical methods pursued by the Commissioners.

Plaintiff states that under the provisions of said Act 245 unless the assessment of 1920 is paid within the said short extended time there will a penalty of 25% added to the aforesaid amount and the Sheriff is required under penalty to proceed to collect said assessment and penalties.

[fol. 23] That the plaintiff is willing and ready to pay all just and equitable assessments made against her land based upon benefits received by it for the construction of the improvement in the defendant district if the court finds that her lands are benefited thereby.

That the plaintiff is advised that she has a good action in equity for relief against the assessments, and alleges that the imposition of said penalty is inequitable and prays that she be permitted to prosecute in good faith her suit for relief without imposition of said penalty and prays that for the protection of the Sheriff as well as for herself, that he be enjoined from collecting the tax of 1920 and from adding the penalty thereupon, and she offers to give good and sufficient surety that she will pay to the defendant district such assessments as to the court may find equitably to be due it, if any, for the year 1920, and prays that if the court holds that no benefits have accrued to her that she have judgment against the district for the amount paid in 1919, and in the alternative prays that if the court holds that she is benefited in some amount that she have credit for the excessive amount which she paid for the 1919 assessments in the years following in which payment was made under compulsion and duress and over protest.

The plaintiff alleges that the assessment and the notice for the year 1919 was void for reasons heretofore stated, to-wit: that proper assessment was not made out and filed with the county clerk for the inspection of the property owners and prays that the court so decree. The plaintiff further prays that she be given her day in

court to be heard upon the merits of the assessments of benefits [fol. 24] against her land and prays that the court find and declare that no valid assessment has been made against her property and further that her property will not be benefited by the improvement in said district and that she have judgment against the district for the amount of taxes which she paid under duress and protest in 1919, and the plaintiff further prays in the alternative that in the event the court should find any benefit to her land that a just and equitable assessment be made and that she be given credit for the payment of 1919 for the future years if the court should find she would be chargeable for any benefits in said district and for all other and further relief which the court may find her entitled to receive.

Hill & Fitzhugh, Attys. for Plaintiff.

STATE OF ARKANSAS,
County Sebastian:

I, Mrs. M. L. House, do upon oath state that I am the plaintiff in the above and foregoing complaint and the allegations therein are true.

Mrs. Mary L. House.

Subscribed and sworn to before me this 24th day of May, 1921. Mable Riley, Notary Public. (Seal.) My Commission expires Feby. 15th, 1925.

[File endorsement omitted.]

[fol. 25] EXHIBIT TO COMPLAINT

Road Improvement District Number 5

Land	Miles from road	Assessment of value	Assessment of benefits
N. E. S. W. 21-6-15....	2 miles	$240	$240
S. ½ N. W. 21-6-15...	2 miles	720	720
N. ½ S. E. 21-6-15....	2 miles	1,440	1,440
S. W. 22-6-15	2½ miles	1,920	1,920
S. E. 22-6-15	2½ miles	1,920	1,920
S. W. 23-6-15	2½ miles from 1st 4 miles from main road	4,800	4,800
S. E. 23-6-15	4 miles from main rd. ...	3,840	3,840
N. W. S. W. 24-6-15 ..	2½ mi. from lateral. 5 mi. from main rd. ...	300	300
S. ½ S. W. 24-6-15 ...	5 mi. from main rd.	600	600

Total acres, 960; assessed val., $15,780; assessed benefits, $15,780.

[fol. 26] IN THE CONWAY CHANCERY COURT

[Title omitted]

AMENDMENT TO THE COMPLAINT

Comes Mrs. M. L. House, plaintiff herein, and in addition to allegations made in her complaint in equity, hereby further complains of the defendants and alleges:

That Road Improvement District No. 5 is created arbitrarily and plaintiff's property *us* taxed dispr-portionately to other lands similarly located in relation to the improvement contemplated in said road district.

That the District is so arbitrarily created as to amount to denial of equal protection of law to the plaintiff, in the following particulars, to-wit:

That the District is created to construct a mainline of road from Plummerville in a northeasterly direction.

That except immediately adjacent to Plummerville that no benefit can accrue to the land situated south of Plummerville by the improvement of said road.

That plaintiff has 160 acres of land situated in section 21, the nearest part thereof being approximately two miles and the furtherest 2½ miles from Plummerville south and east of said town. That the remainder of the Plaintiff's lands are situated in sections 22, 23 and 24—a distance from 3 to 5½ miles south and east of the Town [fol. 27] of Plummerville. That said District only extends 2½ miles south and west of Plummerville and lands situated equidistant from Plummerville south and west thereof as are the lands of Plaintiff in section- 22, 23 and 24, are arbitrarily excluded from said District, and if the Plaintiff's land has any benefit from the said District all land equidistant in the opposite direction from Plummerville has an equal benefit and no burden is placed upon same.

That Plaintiff's lands in said District are separated from the rest of the District by Gap Creek, lakes and bayous and the Mo. Pacific Railroad and the improved road in District No. 2 of Conway County, and the roads in District No. 5 cannot be used from the lands of the plaintiff without going to Plummerville, a distance of from 2 to 5½ miles from her land and land similarly located south and west of Plummerville are not included in said District and have access to the roads of said District. That the District extends easterly from the improved road a distance of 7½ miles, whereas on the west side where there will be equal benefit from the improvement of said road, the District extends from 1½ to 2 miles, thereby arbitrarily including a large area on the east side and excluding a large area similarly situated and benefited, if the said area on the east side is benefited, from said District.

That there is a purported lateral beginning about 2 miles north

of Plummerville and running east which is used as an excuse for including the area on the east side while the corresponding area on the west is not included.

The plaintiff alleges that no substantial work has been done on said lateral and none is planned to be done upon it and even should it be improved into a good hard surface road it would only be a [fol. 28] benefit to lands adjacent to it and would be no benefit to Plaintiff's lands, and other lands similarly situated in the eastern part of the District which cannot gain access to it or use it without first going to the town of Plummerville to reach it, and from the main body of plaintiff's land the said lateral could not be reached without traveling about 7 miles and it is of no value whatever to the plaintiff's land or other lands similarly situated with the plaintiff and *it* of equal value, and if any value whatever be proved, for land similarly situated on the south and west of Plummerville equidistant from Plummerville as plaintiff's land which would likewise have access to it by going to it from the town of Plummerville.

Wherefore, the plaintiff alleges that the District is created so arbitrarily as to amount to a denial to her of the equal protection of the law and of taking her property for public purposes without compensation and of depriving her of her property without due process of law.

The plaintiff further alleges that section 16 of Act 245 under the District is created provides that as soon as the Commissioners have formed a plan for improvements they shall file the same with the county clerk of Conway County and that if any part of the road is to be graded but not surfaced with rock, gravel or other hard material this should be shown in said plans and the estimate of the cost shall state the aggregate cost of the construction of said improvement.

Plaintiff alleges that the defendant District did not comply with said provisions of the act and alleges the facts to be that on July 2, [fol. 29] 1919, said District filed in the office of the clerk of Conway county a document called "Specifications, proposal, contract and bond."

This document was prepared by Parks Engineering Company and was transmitted to the District under a letter of June 23, 1919, stating that it submitted to the Board of Commissioners of said District the following estimate of the cost of constructing a bituminous macadam road according to the plans and specifications hereto attached.

That attached thereto were plans and specifications and quantity estimates of cost, a proposal for constructions, contract and bond. That said document did not purport to be the plans adopted by the Board of Commissioners, but only the plans subsmitted to it by said Engineering Company. It did not show parts of said road to be graded but not surfaced with rock gravel or other hard material and did not show an estimate of the aggregate cost of the constructions of said improvement, other than an addition of various estimates of cost for various quantities to be used in said improvement, which is not such an estimate as is contemplated by said act. Notwithstanding the failure of the commission to comply with said statute an

order was made on July 16th that the plans were examined and approved, whereas there were no plans which purported to have been adopted by the Commission upon which the county court could have acted.

Plaintiff alleged that the filing of the plans as provided in section 16 of Act 245, is jurisdictional and the District failed to comply with [fol. 30] the said section, that all subsequent proceedings of the said District, especially in the levying of assessments against plaintiff's property are void.

Plaintiff further alleges that the plan of the said District prepared by the Parks Engineering Co. was not approved by the Highway Department and in fact the plans on file with the Highway Department are radically different from the plans of the Parks Engineering Company filed with the county clerk, and the approval endorsed on the plans of the Parks Engineering Company on file with the county clerk were not approval of the Highway Department contemplated by Section 14 of Act 245.

Wherefore plaintiff prays for the relief heretofore prayed in her complaint in equity for three additional causes as well as the causes set forth in her complaint in equity.

Hill & Fitzhugh, Attorneys for Plaintiff.

[fol. 31] IN THE CONWAY CHANCERY COURT

[Title omitted]

AMENDMENT TO CONFORM TO THE PROOF

Comes the plaintiff, Mrs. M. L. House and prays leave of the court to file this additional amendment to the complaint, alleging matters herein conformable to the proof adduced, as follows, to-wit:

That the legislature creating said District provided by Act 245 of Section 8 of 1919. That the road to be improved was to consist among other roads of a lateral from the main line beginning one and a half or two miles north of Plummerville and running thence in a generally easterly direction to the Conway-Faulkner County line at Shaw's Bridge, across Cadron Creek.

That the Commissioners after making the assessments complained of in the complaint herein abandoned said lateral known as the Shaw's Bridge or Caney Valley lateral and have eliminated it from the roads to be constructed as provided in said Act of the General Assembly of 1919.

Plaintiff alleges that the action of the Commissioners in abandoning and eliminating and lateral from the plans of construction (which said lateral was the only excuse for benefit to the Plaintiff's lands) rendered the assessment complained of in the original com- [fol. 32] plaint void.

Plaintiff further alleges that the Commissioners made material changes in the plans which were adopted by the county court after advertising as hereinbefore set forth, and that the said changes of plan were the elimination of the Shaw's Bridge lateral and the changing of the extent of the bituminous portions of said road, and is materially increasing the expense of the construction of said road over the estimates set forth in the plans which were approved by the county court.

That the said action of the Commissioners in making said material changes in the plans have rendered void the assessments for benefits hereinbefore set out and described.

Wherefore the plaintiff prays in addition to the complaint that for the reasons herein set forth, that the assessment of benefits complained of in the original complaint be enjoined and that the plaintiff have judgment against the District for the amount of taxes which she paid under protest.

Hill & Fitzhugh, Attorneys for Plaintiff.

[fol. 33] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS

[Title omitted]

ADDITIONAL AMENDMENT TO CONFORM TO THE PROOF

Comes Mrs. M. L. House, the plaintiff herein, and in addition to the alegations in the complaints wherein the assessment of benefits is alleged to be discriminatory, excessive and lacking in uniformity with other property similar in value and location with plaintiff's property, further alleges:

That the Board of Commissioners accepted as a true basis of value the 1917 county assessment, without investigation of its equality and uniformity, and fixed the amount of benefits against plaintiff's land and all other lands in the said District based on a given percentage of said County assessment. That the method adopted by the Board of Commissioners necessarily reflected in the assessment of benefits any errors and discrimination in the 1917 assessment. That the 1917 County assessment was grossly excessive so far as plaintiff's land was concerned, and was reduced $15,000.00 or thirty-three and one-third per cent before the assessment of benefits in the defendant District had been finally approved by the Commissioners, and the Commissioners were ignorant of that fact.

That the reduced assessment of 1919 was excessive compared with [fol. 34] similar land and situation. That the 1917 assessment used as a basis for the assessment by the defendant District's Commissioners was grossly discriminatory and excessive and amounted to a confiscation in the following particulars, to-wit:

The plaintiff had 725 acres of land covered constantly by water, consisting of lakes, bayous, sloughs and creeks.

That said land was of no commercial value and was assessed from $4.50 to $12.50 per acre, and assessment of benefits levied on it on a percentage basis of said values. That from the very nature of said land no possible enhancement in value could be attributed to it by the improvement of the road in defendant District. That the said Commissioners were ignorant of the character of said land or else wilfully perpetrated a fraud on plaintiff.

That the assessment aforesaid against said land amounts to confiscation and should be declared void on said account.

That 1,030 acres of plaintiff's land consist of low, wet and overflowed land not in cultivation and from which the merchantable timber had been taken, and is not susceptible of cultivation except through a system of drainage and levees prohibitive in cost. That said land was assessed at from $5.00 to $20.00 per acre. That its utmost market value would be from $3.00 to $5.00 per acre and on a fifty per cent basis the highest assessment should be $2.50 per acre, and it is assessed from twice to eight times said amount.

[fol. 35] That the defendant's Commissioners were ignorant of the character of said land or else wilfully perpetrated a fraud on the plaintiff.

That the assessment levied upon said land amounts to confiscation and should be declared void on such account.

That the plaintiff has about 300 acres of hill land of small value which is excessively assessed and not uniform with similar lands, and that said Commissioners were ignorant of its character and location.

That the plaintiff's property in the District of real value is about 700 acres of bottom land, a part of which is above overflow but most of it is subject to overflow, and none of it is protected by levees. That over half of it is assessed at $30.00 per acre and the remainder at $22.50 per acre. That $30.00 per acre is the highest amount assessed against any land in the county. That other land in the county assessed at $30.00 per acre is worth double the amount of the plaintiff's lands; and land in the immediate vicinity to plaintiff's land and more accessible to the road of the defendant District is assessed at $30.00 and is worth double plaintiff's land; and hundreds of acres of land immediately adjacent to plaintiff's land and more accessible to the road in defendant District and of as great or greater value than plaintiff's best land, is assessed at from $5.00 to $15.00 per acre. That no land in the vicinity is assessed uniformly with plaintiff's.

That these facts were unknown to the Commissioners when they assessed the benefits or else they wilfully perpetrated a fraud on [fol. 36] plaintiff.

That the plaintiff is willing to assume that the said Commissioners have not wilfully perpetrated a fraud on her, taken advantage of her non-residence in order to lighten the burden of resident tax payers, and alleges that the defendant pursued the method of levying benefits on the 1917 assessment erroneously and thereby a fundamental error

was committed in her assessment of benefits without their knowledge. That said — amounts to a discrimination against and a confiscation of her property and is so gross that it amounts to demonstrable mistake and operates as a fraud. That the said Commissioners, instead of exercising their own judgment of value, accepted said excessive and discriminatory assessment, in violation of their duty to plaintiff.

The plaintiff was without the State during all the times herein complained of and had no knowledge until long afterwards of the gross error or fraud on her rights, and promptly sought relief when she learned of the same from the Board and failing in the same thereafter brought this suit.

That the said Commissioners should be estopped in equity and good conscience from setting up the limitation in Act No. 245, even if it is applicable, which the plaintiff denies for these reasons.

That said Commissioners' demonstrable mistake or fraud was unintentionally made and not known either to themselves or the plaintiff until after said period had run and to allow them now to avail themselves of it would be the assumption of rights based on fraud or [fol. 37] mistake which is contrary to the principles of equity.

Wherefore plaintiff prays for the relief heretofore prayed in her complaint in equity, the amendment thereto, as well as the causes herein set forth.

—— ——, Attorneys for Plaintiffs.

[fol. 38] IN THE CONWAY CHANCERY COURT

[Title omitted]

DEMURRER AND ANSWER

Comes the defendant and demurring generally and specially to the complaint of the plaintiff filed herein, and for cause, says:

(1)

That said complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for.

(2)

That the said paragraphs severally and each of them contained and set out in the said complaint do not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for. That said paragraphs are not numbered and that this demurrer is intended and goes separately and severally to each separate paragraph of said complaint, and the said defendants pray the judgment of this court on their demurrer on their behalf, and saving all their rights and waiving none of them, for answer to the complaint of the plaintiff, says:

[fol. 39] That they deny each and every allegation of said complaint specially and severally except such as are hereinafter admitted.

Admit that said lands alleged and described in the complaint are owned by the plaintiff, but deny that they are assessed in the sum of $15,780.00 as benefits for the construction of the road improvements in said district *in said District,* to be paid in twenty annual installments of $946.80, amounting in all to $18,936.00.

Deny that no notice was given or published in the locality where the lands were to be *effected* thirty days prior to the introduction in the General Assembly of the intention to apply for and pass the act creating said District, and deny that no notice thereof was exhibited in the General Assembly before same was passed; and deny that said act was passed in contravention of Sections 25 and 26 of Article V of the Constitution of 1874, and deny that the passage of said act, the assessment of benefits and the creation of a lien against plaintiff's property for the payment therefor was without plaintiff's knowledge, and deny that Section 26 was not complied with, and that if same was not but had been, that plaintiff would have had a better opportunity of ascertaining the proceedings against her land; and deny that if said proceedings had been under a general law, she would have had a more full and ample notice thereof than is provided in said act.

Deny that plaintiff had no notice or information of the passage of said special act No. 245, until long after the proceedings under said act had fixed a lien upon her said property as in said complaint [fol. 40] stated.

Deny that the defendant proceeded under said act to give a short notice for interested parties to appear of less than twenty days in the county court to hear objections as provided in said act. Deny that on that day the plans were approved, the commissioners filed assessments on July 19, 1919; deny the clerk dated notice June 17th, that said assessment of benefits was filed with the secretary of the Commissioners, and a copy in the clerk's office, open to inspection and that the Commissioners would on the 12th day of August, attend at the court house in Morrillton, Arkansas, for the purpose of hearing any complaint upon said assessment, and that the complaint of any assessment must be filed with the Secretary of the Commissioners in writing before the date of said hearing. Deny that said notice was published in the Conway County Unit on the — day of July, on the 30th day of July, on the 2nd day of August, August 6th and August 12th, and deny that the three last publications *was* within ten days of the date and not to be reckoned pursuant to the act. And deny that said notice and act required plaintiff to file her objection on or before August 11th, 1919, and deny that said notice was in fact or by computation under Section 9756 of Crawford & Moses Digest but eighteen days, and deny that said notice was not in compliance with said statute.

Deny that plaintiff had no actual notice of the proceedings, saw no copy of the newspaper and had no notice whatever of the formation of the District, the proceedings of the Commissioners adopting the plans, the orders of the court in approving same, nor the pro-

ceedings of the Commissioners in assessing her lands with benefits [fol. 41] for the construction of the improvements until long after said date when such proceedings were had.

Deny that said commissioners did not comply with said act and the provisions thereof and set down the description of the real estate in the assessment book, but merely set down the names of the owners and opposite the valuation, and opposite that the assessment of benefits without filling in the said book the property assessed, and deny that said assessment would not give information to land owners and especially the plaintiff of their property assessed. Deny that same was not in compliance with the statute, and deny that same was a jurisdictional requirement of the statute, and deny that the notice based thereon was void, and deny that since said assessment was investigated by the grand-jury, said assessment list has been filled in, and deny that same was not filled in until long after notice thereof had been given. Deny that plaintiff had no knowledge or information of a hearing; deny that constructive notice only was given her and that only for a period of eighteen days for her to file her complaint in the chancery court, controverting said assessments, and deny that she did not have an opportunity to avail herself of said remedy by a suit in chancery within ten days after August 12th.

Deny that plaintiff was not given due and timely notice before the assessment became a lien against her land, of a hearing as to the justice and equity of said assessment, and deny that she was given no such notice by the constructive notice and publication thereof, and deny the utmost time thereof was eighteen days, and deny that [fol. 42] said notice for said time was manifestly insufficient; and denies that the provisions of the statute authorizing the same and as carried out by the Commissioners, amounts to a denial of justice.

Deny that said assessment and the tax thereon as alleged in said complaint is a deprivation of her property contrary to the law of the land as guaranteed by Section 21 of Article 2 of the Constitution of 1874, and denies that same deprives her of her property without due process of law as guaranteed to her by Section 8 of Article 2 of the Constitution of 1874.

Deny that the only notice authorizing said lien and of the filing of said assessment and of fixing the time for the filing of said exceptions was that published in the Conway County Unit on July 23rd and July 30th, and denies that said notice is not such notice as is required to constitute due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

Denies that said acts and proceedings amounted to — the State, through such agents, depriving plaintiff of her property without due process of law, and deny that such proceedings *is* void as in conflict with the 14th Amendment to the Constitution of the United States, and deny that the plaintiff, relying on same has a right to have declared void said assessment against her property.

Denies that plaintiff having no notice in fact of said proceedings of August 12th, 1919, she had no opportunity to take an appeal within ten days thereafter as provided by Section 21 of said act that [fol. 43] she might have taken had she known of said proceedings,

and denies that during the said ten days she was residing in her home in the city of Washington, in the District of Columbia, and had no knowledge or information of said proceedings until long thereafter.

And denies that the creation of said lien was of itself a deprivation of her property rights without due process, contrary to the provisions of the 14th Amendment to the Constitution of the United States, and deny that the said notice and the ten days given to bring suit in the chancery court to contest the assessment would be unreasonably short, amounting in all to only 28 days of constructive notice before her property was taken, and deny that the said ten days cannot be tacked on to the eighteen days' notice, and deny that the said notice did not give any information that such length of time would be given, and deny that said notice stated that "Any complaint of assessment of benefits or damages must be filed with the secretary of the Commisioners before the date of hearing", and deny that said notice was insufficient and only gave information of proceedings of August 12th; and deny that said notice did not give information of the creating of said District by special act of the General Assembly.

Deny that the notice prescribed in Section 20 of Act No. 245 is insufficient on its face to constitute notice to the plaintiff and other land owners of the assessment made against their property, and deny that said notice should give the description of the land and the owners thereof or reference to the acts of the legislature, proceedings [fol. 44] of court or any other source of information by which land owners reading same, would be notified that their lands were within the District assessed.

Deny that the giving of the notice of the filing of the plans required by Section 18 of said act, does not impart information of the land affected by said plans, and gives no reference to any act, map or order of court by which all lands affected could be identified, and deny that it was either necessary or reasonable to include such information in such notice.

And deny that said act by the publication of said notice thereby was not sufficient to constitute due process of law.

Deny that said act itself was passed contrary to the constitutional provisions that notice should be given of its introduction, and deny that the passage of said act without notice would constitute no notice, and deny that such notice required by said act is insufficient to constitute such a notice as is required by due process of law before a lien can be legally created against plaintiff's property, and denies that the meeting was not held on the 12th day of August at the Court House in the City of Morrilton by said Commissioners as required by said act.

Deny that said notice was insufficient to meet the requirements ofthe Constitution as to due process of law and proceedings conformable to the law of the land, and deny that the same is insufficient to meet the requirements of the 14th Amendment to the Constitution of the United States, forbidding any State or any agency [fol. 45] in any State to take property without due process of law.

And denies that plaintiff was not chargeable with notice of the

special act passed by the legislature, contrary to the Constitutional provisions of the notice of its introduction, and denies that her ignorance of law was a mistake of fact of which equity should give relief.

Deny that the said assessment of benefits against her property was excessive, unreasonable and discriminatory, and that she is entitled to relief in equity for the reasons set out in said complaint or any other reasons, and deny that the allegations of said reasons set out in said complaint are correct; and deny that the lands are for a basis of assessment, divided into six zones, according to distance from road, classing all lands in another district as in zone six. Deny that the lands of the plaintiff was assessed 100 per cent of its taxable valuation, and denies that her lands were reduced by encroachments of the river to 2,900 acres; and denies that the cutting of the timber from her said lands or any part thereof decreased its value in the sum of $35,000.00 or any other sum. and deny that she paid taxes upon an increased value or of said timber in the assessed valuation of 1917, and deny that her said assessment was increased in value in said year because of said timber thereon. Deny that the lands of plaintiff has a proportionally higher valuation. Deny that plaintiff's lands had been reduced thirty per cent at the time of the filing of the assessment of benefits, and deny that an assessment upon such benefits if they had been made would [fol. 46] have been fair or sufficient to cover the actual benefits received thereby. And deny that by reason thereof the plaintiff is assessed upon a basis of thirty per cent higher than other land in the District and higher than the value thereof.

Deny that plaintiff's lands in said District is composed of only about 300 acres of good land, comparable to the best lands in that vicinity, and deny that 150 acres is in the cypress brakes and sloughs and that 400 acres is low, wet bottom land of little value and that same could only be reclaimed by a large expenditure for levee and drainage purposes. Deny that there are no houses or other improvements of any considerable value upon said lands, and deny that $1,000.00 would be an excessive valuation for all the improvements thereon.

Deny that the commissioners of district did not take in to consideration the character and value of the land in assessing the benefits thereupon. And deny that the assessments against her lands are grossly discriminatory or in many instances much better lands than hers, lying within a levee district and protected from overflows are assessed for much less than her lands of less value, and denies that the improvements add nothing towards the drainage and protection of her lands. Denies that adjacent lands are assessed much less than hers, and denies that she is discriminated against in said assessments and denies that she is prepared to how upon final hearing, gross or inequitable discrimination against her property.

[fol. 47] Deny that the first information the plaintiff had of the passage of special act No. 245 and the assessment of benefits against her property was in January 1920 when she wrote to ascertain the amount of taxes due for the year 1919. And denies that in order

to avoid the penalties which would have been added against her land she paid the district $946.80 under protest.

Deny that plaintiff has frequently appealed to the commissioners of district for relief; and deny that the same unto her is denied.

Denies that the amounts paid for the assessments for 1919 are more than should be justly paid by her for several years, on a fair and equitable imposition of benefits, and denies that if the court should hold that her property is subject to assessment as having been benefited, that on the adjustment of the benefits in said district by the court, she should be given credit against future assessments for the amount paid in 1919.

Deny that the inclusion of her land in said district is arbitrary exercise of legislative power and void as such, and deny that the assessment of benefits whatsoever against her land for the construction of improvements provided in said act is arbitrary or without just basis and deny that her land is not and cannot be benefited by the improvements provided for in said act. Deny that the road running from Plummerville and its lateral is beneficial to the country they traverse and to the Town of Plummerville but are no benefit whatever to the present or future use of the plaintiff's lands; [fol. 48] and denies that it directs traffic from plaintiff's land: deny that the imposition of an assessment upon plaintiff's land results in taking plaintiff's property to pay improvement to other peoples property and to help construct roads in other parts of the county, which from their nature and future use would not be used by the owners or occupants of the plaintiff's lands. Deny that the commissioners have authorized a bond issue of $363,000 and have sold $226,000 and deny having paid an excessive and unlawful commission and have only received $207,308.23. Deny that the commissioners have paid for attorney's fees $5,630.00 — is excessive. Deny that should the court hold any of plaintiff's land has received any benefits and she should be taxed therefor, then that as a tax payer the district should be required to account for fees paid for bond sales or to attorneys.

Defendant further alleges by way of affirmative defense that said special act was legal and constitutionally passed, creating the said road district; that all provisions of law were fully complied with in the organization thereof and in the assessment of benefits; that the provisions thereof for notice and notices thereunder and all other proceedings had were reasonable, constitutional and not in contravention of any of the provisions of the Constitution of the State of Arkansas or of the United States; that the lands of plaintiff in said district was benefited by the construction of said improvement in the amount equal to and more than assessed against same; that the making of the assessment and levy and installments of taxes [fol. 49] thereon was in conformity of law, and that plaintiff's entire complaint is without equity.

Defendant further alleges by way of cross complaint that the respective assessment of benefits and the taxes imposed thereon against the various tracts and parcels of land of the plaintiff is legal, just

and is now long past due and wholly unpaid and constitutes a valid and subsisting lien against plaintiff's lands.

Wherefore, it is prayed that plaintiff's complaint be dismissed for want of equity, and that the defendant have judgment for its said taxes and installments against the benefits assessed against the various tracts of lands, and that same be declared a lien and that said lands be condemned and sold in the way and manner provided by law for said taxes, for the penalties allowed by law and for interest and cost and for all other proper relief.

J. W. Johnston, Strait & Strait, Attorneys for Defendants.

[fol. 50] IN THE CHANCERY COURT OF CONWAY COUNTY, ARKANSAS

[Title omitted]

DEMURRER AND ANSWER TO THE AMENDMENT TO THE COMPLAINT

Comes the defendant, Road Improvement District No. 5 of Conway county, and R. E. Bartlett, Sheriff of Conway county, and demurring to the amendment to the complaint filed in this cause for reason states:

(1) That said amendment as a whole does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for.

(2) That neither paragraph of said Amendment to the complaint states a cause of action against the defendants or entitles the plaintiff to the relief prayed for.

And the said defendants saving all their rights under the demurrer for their answer to said amendment:

Deny that said Road District No. 5 was arbitrarily created and that plaintiff's property is taxed disproportionately to other lands similarly located in relation to the improvement contemplated in said District.

Deny that said District is so arbitrarily created as to amount to a denial of the equal protection of the law to the plaintiff in the particulars alleged and set out in said amendment; and deny that ex-
[fol. 51] cept immediately adjacent to Plummerville no benefits can accrue to the lands situated South of Plummerville by the improvement of said road; and deny that plaintiff's 160 acres situated in Section 21 is approximately two and one-half miles from Plummerville; and deny that plaintiff's other land in said District is from three to five and one-half miles South and East of Plummerville; and deny that other lands situated an equal distance from Plummerville as are plaintiff's lands in Sections 22, 23 and 24, are arbitrarily excluded from said District; and deny that all equidistant in the opposite direction from Plummerville has equal benefits with plaintiff's lands.

Deny that plaintiff's land in said District are separated from the rest of the District by Gap Creek, lakes and bayous and the Missouri Pacific Railroad, and deny that the road in District No. 5 cannot be used from the lands of the plaintiffs without going to Plummerville, a distance of from two to five and one-half miles from her land; deny that lands South and West of Plummerville similarly located are not included in said District. Deny that said District extends eastwardly and westwardly only one and one-half miles to two miles or that if same does, that such fact arbitrarily includes a large area on the East side and excludes a large area on the west side similarly situated and benefited.

Deny that the lateral beginning two miles north of Plummerville is used as an excuse to include the area on the East side while a corresponding area on the west side is not included. Deny that no substantial work has been done on said lateral and that none is planned to be done, and deny that if same should be improved it would only [fol.52] be a benefit to lands adjacent to it; and deny that same would be of no benefit to plaintiff's land; deny that plaintiff's lands are not accessible to road without first going to Plummerville; and deny that said lateral cannot be reached from plaintiff's land without traveling about seven miles; and deny that same has no value whatever to plaintiff's lands and deny that same is equal value to lands south and west of Plummerville, and deny that for said reasons, or any of them the District is so arbitrarily created as to amount to a denial to the plaintiff of the equal protection of the law or to a taking of her property for public use without compensation, or of depriving her of her property without due process of law; deny that the defendant District did not comply with the provisions of Act No. 245 as alleged in said amendment.

Deny that on July 2, 1919, the District filed in the office of the Clerk of Conway County a document called "specifications, proposal, contract and bonds prepared by the Parks Engineering Company, which did not purport to be the plans adopted by the Board of Commissioners but only the plans submitted to it by the said Engineering Company; and deny that same did not show parts of said road to be graded, surfaced with rock, gravel or other hard material, and did not show an estimate of the aggregate cost of the construction of said improvement other than an addition of various estimates of cost for various quantities to be used in said improvement, and deny that same is not such an estimate as is contemplated by said Act, and deny that there were no plans adopted or purported to have been adopted by the Commissioners upon which the county court could [fol. 53] have acted by its order of July 16th; defendants alleges that plans and specifications were filed as required by law, and deny that said plans and specifications and those prepared by the Parks Engineering Company were not approved by the Highway Department. Deny that the plans filed with the Highway Department are radically different from the plans filed by the county clerk, and deny that those filed with the county clerk were not the plans approved by the Highway Department and contemplated by said Act.

Wherefore, having fully answered the said defendants pray the judgment of the court in their behalf.

—— ——, Attorneys for Defendant.

[fol. 54] IN CHANCERY COURT OF CONWAY COUNTY

[Title omitted]

DECREE FOR DEFENDANT

On this the 20th day of April, 1922, comes the plaintiff, Mrs. M. L. House, by her attorney, Hon. Jos. M. Hill; comes also the defendant by its attorneys J. W. Johnston and Strait & Strait; and this cause being a suit brought by the plaintiff against the defendant to declare the legislative organization of said District and the assessment of benefits against Plaintiff's lands situate therein made by the Commissioners, null and void and to enjoin the collection of all assessments levied upon the betterments fixed and assessed against the plaintiff's land within said district, coming on for hearing upon the complaint of the plaintiff and all amendments thereto, and upon the general and special demurrer and answer of the defendant thereto, and the court being well and sufficiently advised doth sustain said demurrer to all questions and matters raised by the complaint and amendments thereto except the question as to whether or not the Commissioners had abandoned the construction of the improvements contemplated upon what is commonly termed "the Shaw Bridge lateral" leaving the main road North of and near Plummerville and extending in an Eastwardly direction to the county line, and the question of whether or not the legislature acted arbitrarily in including plaintiff's land in the said District and excluding certain other lands alleged to have been specially benefited, to which ruling on said gen-[fol. 55] eral and special demurrer the plaintiff at the time excepted and saved exceptions and said cause coming on for hearing upon the questions and matters alleged in said complaint to which the said demurrer was overruled and not sustained as above set out, and the court being well and sufficiently advised, doth find the issues against the plaintiff and for the defendants and upon defendants' cross complaint asking judgment for the past due taxes the court also finds for said cross complainant.

It is therefore, by the court considered, ordered, adjudged and decreed, that the plaintiff's complaint herein, together with all amendments thereto, be and the same is hereby dismissed for the want of equity and that the said defendant, Road Improvement District No. 5 of Conway County, Arkansas, do have and recover of and from the said plaintiff, the said sum of $—, being the annual tax levied and assessed upon said assessed benefits for the year 1920, due in the year 1921, heretofore enjoined by the temporary restraining order issued in this cause by this court in the sum of $—, together with interest thereon at the rate of six per cent per annum

from the — day of ——, 1921, until paid; from all of which findings and rulings the plaintiff, Mrs. M. L. House, prayed and is hereby granted an appeal to the Supreme Court; and it is further ordered that upon the execution and filing with the clerk of this court a bond to be approved by him within 20 days from this date, conditioned as provided by law for appeals to the Supreme Court, and further conditioned as provided by law for payment of all damages which defendant may sustain by reason of the injunction, then [fol. 56] that pending a final hearing of this cause on appeal, execution upon said judgment for taxes as above set out, be and the same is hereby stayed, and in addition thereto the collection of all taxes penalties and costs for the year 1921, due in 1922, upon the lands of this Plaintiff to the said District be and the same is hereby enjoined and restrained until further order of this court, the Supreme Court, or any other court having jurisdiction herein or thereof.

[fol. 57] STATE OF ARKANSAS, ss:

IN THE SUPREME COURT

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 27th day, being the fourth Monday of May, A. D. 1922, amongst others, were the following proceedings, to-wit: On the 13th day of November, A. D. 1922, a day of said term:

IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER EXTENDING TIME

On motion, and for good cause shown, it is ordered by the Court that the appellees herein are allowed until the 10th of December, prox., in which to file their brief.

IN SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

[Caption omitted]

ORDER SETTING CAUSE FOR HEARING

March 19th, 1923.

This cause, having heretofore been noted for oral argument, is now by the Court set down for such argument on April 2nd. prox.

[fol. 58] IN SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

[Caption omitted]

ARGUMENT AND SUBMISSION

April 2, 1923.

This cause being regularly called come the parties thereto by their solicitors, and said cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement.

IN SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

[Caption omitted]

DECREE

April 6, 1923.

This cause came on to be heard upon the transcript of the record of the chancery court of Conway county, and was argued by solicitors, on the consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellant and Fidelity & Deposit Company of Maryland, surety in the supersedeas bond filed in this cause all their costs in this Court and the court below in this cause expended, and have execution thereof.

Wood and Hart, J. J. dissent.

[fol. 59] IN THE SUPREME COURT OF ARKANSAS, APRIL 16, 1923

No. 314

[Title omitted]

OPINION

HUMPHREYS, J.:

Appellant instituted this suit in the chancery court of Conway county against appellees attacking the validity of Road Improvement District No. 5 of Conway County, and the assessments of benefits against appellant's lands embraced within the district. The district

was created along with other districts in said county by Special Act No. 245, of the Legislature of 1919. The first ground upon which the validity of the Act itself is assailed is, that the notice to the property owners, whose lands were included in the district, provided for in the Act was not sufficient as to time, or upon its face, to apprise property owners of the burdens about to be laid upon their lands, and was a taking of appellant's property included in the district, without due process of law. This identical point was involved and determined adversely to the contention of appellant in her attack upon Road Improvement District No. 2 of Conway County, which is a companion case to this in many respects. We deem it unnecessary to reiterate what was said in that case bearing upon this point. The second ground of attack upon the validity of the district is, that it was arbitrarily created by the Legislature as evidenced first, by the [fol. 60] alleged exclusion of benefited lands from the district, and second, by the alleged inclusion of appellant's un-benefited lands in the district.

(1) The district, for the greater length thereof, is between seven and nine miles in width. It is about twenty miles in length. Plummerville is situated in the southwestern corner of the district and, generally speaking, the district lies toward the northeast from Plummerville and includes the town of Springfield, situated eleven miles northeast of said town. The main road of the district runs due north from Plummerville for a distance of three miles where it turns toward the northeast, running through Springfield and to the easter- boundary line of said district. A prong of the road also runs due north out of Springfield to the northern boundary line thereof. About three miles north of Plummerville a lateral runs in an easterly direction to the east boundary line of the district. From this description it will be readily seen that the boundary lines of the district immediately south and west of Plummerville are much nearer the main, improved road than the east boundary line. It necessarily follows that the lands adjoining the district south and west of Plummerville are nearer to the main, improved road than some of the lands east and southeast of Plummerville which were included in the district. Appellant makes the argument that because lands west and south of the district are nearer the main improvement than lands east and southeast thereof, which were included in the district, the district was arbitrarily created and, therefore, void. There are several reasons why this is not so.

[fol. 61] In the first place, Section 17 of the Act creating the district authorized the county court upon notice and hearing to extend the boundaries of the district so as to include any lands benefited by the improvement. The purpose of including a flexible provision of this kind in the Act was to preserve its validity in case a demonstrable mistake was made by the Legislature in establishing the boundary lines so as to exclude lands benefited by the improvement. The remedy of the property owners was not to impeach the validity of the district on account of exclusion of benefited lands but to move the inclusion of them.

Again, there is nothing in the Act creating the district, or any fact of which the court will take judicial notice, showing a demonstrable mistake or arbitrary action, on the part of the Legislature, in excluding lands from the district. The Act, itself, included the other lands excluded from District No. 5, of which complaint is made, in other improvement districts, and from aught that appears, under the general system of improvement, may have equitably apportioned the lands to the particular district in which they would receive local and peculiar benefits on account of trade relationships, markets, etc.

And again, this court is firmly committed to the doctrine that improved roads must necessarily have termani and improvement districts, boundaries. Hill v. Echols, 140 Ark. 479; Tatum v. Wallace, 146 Ark. 289.

(2) The south boundary line of said District No. 5, is the south line of Sections 19, 20, 21, 22, 23, and 24 in Tp. 6 N., Range 15 W., [fol. 62] in Conway County. A part of appellant's lands were located in Section 21 in said district. Appellant alleged and made proof that on account of Gap Creek and cypress brakes the only practical route from said lands in Section 21 to the improved roads in said district is to cross the south boundary line thereof and pass over lands not included in the district, and a part of which was nearer the improved road than appellant's lands. Appellant argues that this situation invalidates the Act creating the district under the rule announced in Heinemann v. Sweatt, 130 Ark. 70, and subsequently approved in Milwee v. Tribble, 139 Ark. 574; Johns v. Road Imp. Districts, 142 Ark. 73, and Ruddell v. Rutherford, 143 Ark. 49. The rule announced in those cases is, that when it appears from the face of the Act creating an improvement district, or from conditions or situations of which the court will take judicial knowledge, that lands of complaining owners are entirely separate from the roads to be improved by intervening lands excluded from the district, or by impassable obstructions or barriers, the inclusion of the lands thus separated renders the Act void because arbitrary and discriminatory. In the instant case the Act, itself, nor any impasse of which this court will take judicial notice separates appellant's lands in Section 21 from the improved roads in the district. On the contrary, none of the lands embraced in the district, according to the face of the Act and such facts as this court judicially knows, are separated from the improved roads by an empasse or intervening excluded lands. The Ruddell case, supra, which learned counsel so earnestly insist con- [fol. 63] trols the case at bar is not applicable because the impasse in that case was an island and navigable stream of which this court took judicial notice. The only obstructions between appellant's lands in Section 21, and the improved roads in said district are a small creek and cypress brake of which this court takes no judicial notice. The statute itself does not impose any burden on the lands included, but merely creates the district and fixes the boundaries. Adequate methods are provided for the ascertainment of actual benefits and burden of assessments, and the owners of property are given an opportunity to be heard, which constitutes due process of law. The

mere creation by the statute of the district as a public agency for the construction of a proposed improvement is a legislative, not a judicial, proceeding and does not present a judicial question further than the determination whether the statute is a valid enactment, and this must be determined from the face of the statute and matters of which the court may take notice. Greene County v. Clay County, 135 Ark. 301. Hence the facts upon which the Legislature is presumed to have based its determination as to the wisdom and propriety of the enactment cannot be reviewed by the courts. The federal cases, on which learned counsel for appellant rely, recognize this distinction. Houck v. Little River Drainage Dist. 239 U. S. 254; Myles Salt Co. v. Iberia Dist. 239 U. S. 478.

In the Houck case the court said: "Whether the expense of ascertaining the best method of reclamation should subsequently be reimbursed when final assessments were laid according to benefits ascertained to result from the execution of the final plan, presents a question of policy and not of power. These outlays for organization and preliminary surveys could as well be considered specially to con- [fol. 64] cern the district, as constituted, as highways or public buildings of plans for the same (whether consummated or abandoned) could be said to concern counties or towns. Further, it would seem to be clear that the State could appropriately provide for meeting the preliminary expense when it was incurred and could determine the manner of apportionment according to the interests deemed to be affected as they existed at the time. And in this view, it is not material to consider whether the area of the district might subsequently be extended, or what particular lands within it would be appropriated for ditches, reservoirs, etc., if a plan of drainage were adopted and carried out. To say that the tax could not be laid except as a result of such an inquiry would be to assert in effect that as a preliminary tax it could not be laid at all. We knew of no such limitation upon the State power."

The validity of the assessment of benefits against appellant's lands embraced within the district and the right to collect same are assailed upon a number of grounds, all of which, except one, were decided adversely to appellant's contentions in her attack upon the validity of the assessments and the right to collect same in the case of Mrs. M. L. House vs. Road Imp. Dist. No. 2 of Conway County, et al. submitted as a companion case with the case at bar. In order to avoid repetition we refrain from discussing these points again. One ground of attack is made upon the validity of the assessments of benefits and the right to collect same against the lands in the instant case which was not made in the case referred to. It is alleged that the commissioners abandoned the construction of a lateral [fol 65] beginning about two miles north of Plummerville and running east to the eastern boundary line of the district and known as Shaw's Bridge lateral, or Caney Valley lateral. It is contended that the elimination of that lateral was a substantial departure from the improvement designated by the Legislature. The lateral in question was about eight miles long, and under numerous decisions of this

court was an essential part of the improvement contemplated by the Legislature, and the elimination thereof would be a material change in the plans, having the effect of avoiding the assessment against the lands in the district for its construction. Phillips v. Tyronza & St. Francis Road Imp. Dist., 105 Ark. 487. The trial court found that the lateral in question had not been abandoned by the commissioners. The record reveals that from thirty-five to forty per cent. of the work on this lateral has been done, and that the commissioners intend to complete it along with the other portions of the road when the finances of the district will justify them in doing so. Each commissioner gave testimony to that effect. The only testimony appearing in the record tending to show an abandonment of the lateral is unauthorized letters written by two of the commissioners of the State Highway Department in an effort to procure State and Federal aid. The letters indicated a purpose on the part of the commissioners to abandon the lateral, but we do not regard them as conclusive upon the point. The commissioners who signed the letters testified they did so without any authority from the board and that they were entirely unofficial. The finding of the [fol. 66] chancellor to the effect that the commissioners had not abandoned the construction of the lateral is in accordance with the weight of the testimony.

No error appearing, the decree is affirmed.

Justices Wood and Hart dissent.

[fol. 67] IN THE SUPREME COURT OF ARKANSAS, APRIL 16, 1923

No. 317

[Title Omitted]

DISSENTING OPINION

HART, J.:

What was said in the dissenting opinion in the case of Mrs. M. L. House v. Road Improvement District No. 2 of Conway County applies with equal force to the facts presented by the record in this case, and need not be repeated here.

There is another phase of this case which in our judgment requires us to voice our dissent in writing. In this case the majority of the court has announced the rule to be that it is only when it appears from the face of the act creating an improvement district or other facts of which the court may take judicial knowledge, that the courts will review the action of the Legislature arbitrarily including lands in such district. It is true that in the cases cited in the majority opinion it appeared from the face of the act that they were arbitrary

and discriminatory and the court so stated in the opinion. This was but the statement of a fact as it appeared from the record and by no means constituted or was intended to constitute a holding that the courts would not review the action of the Legislature in establishing an improvement district however arbitrary it might be, unless that fact was shown on the face of the statute itself, or by facts of which [fol. 68] the court would take judicial knowledge. In cases of this sort the courts are not concerned about the method of proof. They are only concerned about whether the proof has been made by satisfactory and competent evidence. The general rule is that when owing to peculiar or extraordinary facts established by satisfactory and competent evidence the usual presumption in favor of the legislative act has been overcome, the courts will interfere to prevent an illegal exaction from the land owner and a virtual confiscation of his property. If the Legislature has no power to arbitrarily include land in an improvement district, the courts should interfere and grant relief when that fact is shown by any competent and satisfactory evidence.

It would seem that the majority opinion by necessary implication overrules the salutary principles of law announced in Louisiana & Arkansas Railway Co. v. State, 85 Ark. 12. In that case the court held that a legislative determination that a station should be erected and maintained at a certain point is conclusive unless the courts can declare as a matter of law that such determination is arbitrary and unreasonable. In that case proof was offered and rejected in the court below to show that there was no public necessity for the station and that the requirements of the legislation were so arbitrary and unreasonable as to demand a judicial review of the question. The court held that the rejected evidence was competent and that for the court to refuse a consideration of it would be to deny the railroad company the equal protection of the law and would in effect be [fol. 69] depriving it of its property without due process of law. In discussing the question the court referred to the fact that the legislature has the power to determine for itself the boundaries of a local improvement district, but that the court had held that the power when arbitrarily and unreasonably exercised is not beyond judicial control.

The court approved the doctrine stated by the Supreme Court of the United States in Norwood v. Baker, 172 U. S. 269. "But the power of the Legislature in these matters is not unrestricted. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go inconsistently with the citizen's right of property."

The court said that this principle was applicable in the station case. Continuing the court said that it is a question primarily for legislative determination and that determination should not be disturbed by the court unless the power has been exercised without reason. We see no reason why the arbitrary action of the legislature might be shown by any competent proof in that case and limited to facts of which the court might take judicial knowledge in the present case. It may not be impertinent to add that no reason is attempted to be given for such limitation in the majority opinion.

The principle upon which the arbitrary action of the Legislature

in matters of taxation and special assessment may be reviewed by the court is well stated in Stuart v. Palmer, 74 N. Y. 183. In discussing [fol. 70] the subject Judge Earl speaking for the court said:

"The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature cannot do nor authorize to be done. "Due process of law," is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. (Weimer v. Bruenbury, 30 Mich. 201.) This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

With reference to the facts showing the arbitrary action of the Legislature but little need be said. The undisputed facts show that the lands of appellant are separated from direct connection with the [fol. 71] proposed road by lakes and brakes which are impassible. The evidence shows that it would not be practical to construct bridges over this impassable way and the only practical route for appellant to use the improved road is to leave her land and go upon adjoining lands in order to reach the road.

This brings the case directly within the rule announced in Ruddell v. Rutherford, 145 Ark. 48, and other cases of like character.

We concede the general rule to be that if the legislature has fixed the boundaries of the district and paid the special tax or provided for a subordinate agency to do so, its action must in general be deemed conclusive. To invoke the intervention of a court against the result of its conclusion is to invoke judicial authority to give its judgment controlling effect over that of the legislature in a matter of the apportionment of a special tax, and this can only be done where the legislative action is manifestly colorable and arbitrary. This is the basis of our holding in Ruddell v. Rutherford, supra.

In that case the legislature eliminated Sec. 18, and thereby determined that it was not benefited by the improvement. It included Sec. 19 in the district, thereby concluding that it was benefited. It appeared from a map introduced in evidence that it was impractical to go from Sec. 19 to that part of the district where the improved road was without passing through Sec. 18. Hence the statute was held to be arbitrary and discriminatory on its face.

The court was not concerned about the method of proof. Because

the act on its face was discriminatory was not the fact which gave [fol. 72] the court jurisdiction. The arbitrary and discriminatory action of the legislature was what made the exception to the general rule and gave the court jurisdiction in the premises. This is illustrated by the case of Little Rock v. Katzenstein, 52 Ark. 107.

In that case the court held that the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected except when attacked for fraud or demonstrable mistakes.

The court said that a demonstrable mistake of fact, meaning by this expression, a mistake of fact as to the existence of which there was no room for doubt. If no such limits exist the power of local assessments would be but another means for arbitrary exaction and in such cases the wrong must always be open to correction.

We also dissent from that part of the opinion which holds that the action of the legislature in fixing the boundaries of the district was not arbitrary. We concede that the members of the legislature are presumed to have a general knowledge of the geography as well as the topography of the State. They are supposed to act upon this general knowledge and upon information furnished by the committees and other agencies selected by it. All these are evidences upon which the legislature acts. But here again there is a well known exception to the general rule and that is that the legislature can not act in an arbitrary, discriminatory manner in fixing the boundaries of a district.

[fol. 73] In concluding this discussion on this branch of the case the majority opinion gravely adds that this court is firmly committed to the doctrine that improved roads must necessarily have termini, and the improvement districts, boundaries. This is so in the very nature of things, but it does not follow that the legislature can not act arbitrarily in fixing the boundary without its action being reviewed by the courts. There, as here, the testimony is all one way and shows that the legislature acted arbitrarily and in a discriminatory manner in fixing the boundaries of the district. The court should declare as a matter of law that the creation of the district was invalid and any assessments levied under it an illegal exaction. To hold otherwise is to deprive the landowner of his property without redress.

Justice Wood concurs in the views here stated.

[fol. 74] In Supreme Court of Arkansas, November Term, 1922

(Caption omitted)

Order Enlarging Time

April 30, 1923.

The appellant having filed a petition for rehearing within the time allowed by law, now prays for time in which to file a supporting

brief; and said appellant is allowed by the Court one week from date in which to file such brief.

[fol. 75] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

MOTION FOR REHEARING—Filed Apr. 28, 1923

Comes the appellant and asks that its motion for rehearing filed in her suit against Road District No. 2 determined with this one be taken as also filed herein, and alleges that the Court in determining this case adopted on the questions of due process the discussion and determination of those issues in the No. 2 case apply equally to this case.

Further, the appellant without acquiescing in any other part of the opinion, alleges that there is an outstanding error in this opinion to which this motion is directed as follows, to-wit:

The Court holds that the rule announced in the cases cited is that when it appears from the face of the Act creating an improvement district, or from conditions or situations of which the Court will take judicial cognizance that lands of complaining owners are entirely separated from the roads to be improved by intervening lands excluded from the district, or by impassable obstructions or barriers the inclusion of the lands thus separated renders the act void, because arbitrary and discriminatory, but held that in the instant [fol. 76] case neither the Act itself nor any impasse of which the Court will take judicial notice separates appellant's land in Section 21 from the improved roads in the district and for that reason declined to apply the rule announced by the Court in Ruddell v. Rutherford, 145 Ark. 49, and distinguishes this case from that one on the ground, that the Ruddell case was not applicable because the impasse in that case was an island and navigable stream, of which the Court took judicial notice, whereas the impasse in this case was not of such character that the Court took judicial cognizance of it, but was established by evidence.

The appellant alleges that the distinction drawn is erroneous and contrary to the decisions of this Court.

Wherefore for the reasons alleged in the Motion in the No. 2 case and the reasons herein set forth, the appellant prays for a rehearing and that these questions be reconsidered.

Hill & Fitzhugh, Attorneys for Appellant.

I, Joseph M. Hill, certify that I am one of the attorneys for the appellant in the foregoing motion for rehearing which is filed in good faith and because I believe the statements therein stated are correct.

Jos. M. Hill.

[File endorsement omitted.]

[fol. 77] IN THE SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1922

(Caption omitted)

ORDER OVERRULING MOTION FOR REHEARING

May 21, 1923.

Being fully advised, the petition for rehearing filed herein is by the Court overruled; and the opinion heretofore handed down is by the Court amended.

[fol. 78] STATE OF ARKANSAS, ss:

IN THE SUPREME COURT

CLERK'S CERTIFICATE

I, W. P. Sadler, Clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings, as called for by the stipulation filed herein by the Attorneys of Record, in the case of Mrs. Mary L. House, Appellant, against Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, and also of the opinion of the court and of the dissenting opinion rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 16, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas, By ——, Deputy Clerk. (Seal of the Supreme Court of Arkansas.)

[fol. 79] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 4, 1923

Now comes Mrs. M. L. House, Petitioner herein and Plaintiff in Error, by her attorneys, Joseph M. Hill and Henry L. Fitzhugh and in connection with her petition for writ of error makes and declares the following assignment of errors, to-wit:

First. The Court erred in deciding that the notice authorized by Act 245 of the General Assembly of 1919, which notice provided for a publication once a week for two weeks of the hearing upon th

assessments of benefits levied against real property in the district, and which notice in this case was published in a weekly newspaper in Conway County, Arkansas, in its issues of July 23rd, and 30th, 1919, advising all persons to file their objections to their assessments in writing before August 12, 1919, and stating upon which date the Commissioners would hear and determine such objections so filed in writing before said date, was due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States.

Second. The Court erred in deciding that the notice in the form prescribed by Section 20 of Act 245 of 1919, which is as follows:

"Notice of the Assessment of Benefits in Road Improvement District No. — of Conway County, Arkansas

Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number — of Conway County has been completed and is on file with the secretary of said commissioners, and is open for inspection, and a copy of said assessment of [fol. 80] benefits and damages is on file in my office and open to inspection and that the said commissioners for said district will on the — day of ——, ——, attend at ——, Conway County, for the purpose of hearing any complaints against any of said assessments of benefits or damages.

Any complaint of any of said assessment of benefits must be filed with the secretary of said commissioners in writing before the date of said hearing,"

and which notice was given in the above form in this case, said form being filled in by inserting the number of the district, the name of the clerk and the date and place of the hearing, constituted such notice as complied with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third. The Court erred in deciding that the system of levying special assessments as pursued by the commissioners of the defendant district acting under said Act 245 of 1919, when applied to the assessment of the appellant's property was valid, instead of holding the same to be arbitrary under the facts herein and in not holding the same to be arbitrary under the facts herein and in not deciding that the said action of the Commissioners in applying the system which they did apply under authority of said Act 245 amounted to taking the plaintiff's property without due process and deprived her of equality before the law.

Fourth. The Court erred in deciding that said Act 245 of 1919, creating the defendant district was not an arbitrary act of the Legislature in that it excluded benefited lands and included lands not benefited, thereby taking appellant's property to pay for public improvements without compensation and depriving her of her property without due process of law.

Fifth. The Court erred in deciding that Act 245 of 1919, creating the defendant district was not an arbitrary act of the Legislature in that it excluded benefited lands and included lands, if benefited at all, less than excluded lands similarly situated to appellant's land, [fol. 81] and if the appellant's lands were benefited, necessarily the excluded lands similarly situated were benefited, thereby denying the appellant equal protection of the law and taking her property without due process.

Sixth. The Court erred in deciding that notwithstanding the evidence established that part of appellant's lands were inaccessible to the improved road without going outside of the district and through lands nearer the improved roads than her land, which lands were not included in the district, because it held that the Court could not decide that the action of the Legislature in creating the district including her lands was arbitrary, and that such action deprived plaintiff of her property without due process, and denied her equal protection of the law, as it held that it could only so decide when the facts so appeared from the face of the Act itself, or from facts of which the Court took judicial notice.

By reason whereof, this petitioner and plaintiff in error prays the decision of the Supreme Court of Arkansas may be reversed and justice done.

Done this 4th day of June, 1923.

Joseph M. Hill, Henry Fitzhugh, Attorneys for Petitioner and Plaintiff in Error.

[File endorsement omitted.]

[fol. 82] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed June 4, 1923

To the Honorable E. A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas:

Comes Mrs. M. L. House, the appellant in an action lately pending in this Court, wherein she was the appellant and Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, were the appellees, and represents that on the 21st day of May, 1923, final judgment was entered by the Supreme Court of Arkansas, affirming the decree of the Conway Chancery Court, in a suit in equity wherein said appellant was the plaintiff, and said appellees herein named were the defendants, wherein her complaint in equity was dismissed with a judgment against her for costs and the taxes sought to be enjoined.

That this was a complaint in equity filed by her, as property owner in Road Improvement District No. 5 of Conway County, Arkansas, wherein an assessment of special benefits amounting to $15,780.00 had been levied against her property in said district; that said district was created under Act 245 of the General Assembly of 1919. That said Act provided for a notice to be given by the Commissioners after they made their assessments of a hearing of any objections thereto, and provided for two weeks' notice to be given by publication in a weekly newspaper, and for said objections to be filed in writing prior to the date set for said hearing; that said notice was given as prescribed in said Act and was published for only two weeks, and said notice was in a form which did not mention the Act under which said Commissioners were proceeding, and did not describe the boundaries of the District, the location thereof of the lands therein to be affected, nor persons therein to be affected. [fol. 82½] That the appellant was a non-resident of the State of Arkansas, and was residing in the City of Washington, D. C. during all the time proceedings were had under said Act and did not learn of said proceedings until long thereafter.

That her complaint in equity alleged that said notice was not in accordance with due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and was not in form sufficient to convey notice as required by said due process provision of said Amendment, and the defendant specially set up her right and immunity to said levy of taxes against her land without due and proper proceedings in accordance with the law of the land, and she denied the proceedings had were in accordance therewith.

She further alleged that the assessment as made by the Commissioners pursuant to the terms of the Act were arbitrary and that the system which they pursued in assessing her property placed upon her property a greater burden than upon similar property similarly situated, and is discriminatory, and denied her the equal protection of the law and resulted in taking her property without due process of law.

Furthermore the appellant alleged in her said complaint that the said Act of the General Assembly creating said defendant district was arbitrary in that it included her land in said district and did not include other lands which were benefited by said improvement, and that her lands if they had any benefit whatever from the contemplated improvement were less benefited than other lands similarly situated nearer to the improved road which was excluded from said district, and furthermore she alleged that part of her lands which were assessed are so situated that they were inaccessible to the improved road, except by going without the District, traveling through land situated nearer to the improved roads than her lands which were not included in said District, in order to reach the improved road and that she offered evidence which sustained these [fol. 83] allegations and which evidence the Supreme Court found did sustain said allegations, but for reasons given in its opinion

said Supreme Court decided that it could not afford the appellant relief.

That the decision of the Conway Chancery Court was against her contentions and denied her the rights and privileges which she specially set up and claimed under the Constitution of the United States and the Supreme Court did, on the said 21st day of May, 1923, affirm said decision.

Your Petitioner alleges that said decision denies to this appellant the equal protection of the laws and takes her property without due process; and your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, your petitioner prays that a writ of error may be issued in this cause from the Supreme Court of the United States to the Supreme Court of Arkansas, for the correction of errors so complained of, and that a transcript of all of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court, may be sent to the Supreme Court of the United States as provided by law.

Dated this 4 day of June, 1923.

Joseph M. Hill, Attorneys for Petitioner and Plaintiff in Error.

Upon the consideration of the above and foregoing petition for writ of error it is ordered that said writ of error issue upon the execution by the appellant, Mrs. M. L. House, of a bond in the sum of $3,000.00, said bond to be conditioned as prescribed by the law and practice in such cases and such bond when approved to act as a supersedeas.

Given under my hand and seal this, the 4 day of June, 1923.

E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 84] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

BOND ON WRIT OF ERROR—Filed June 4, 1923 [for $3,000.00; approved, McCulloch, J.; omitted in printing]

[fol. 85] [File endorsement omitted.]

[fol. 86] WRIT OF ERROR—Filed June 4, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Chief Justice and Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings and in the affirmance of the decree of the Conway Chancery Court, as also in the rendition of the judgment of a plea which is in the Supreme Court of Arkansas before you, being the highest Court of law or equity, of said state in which a decision could be had in the suit between Mrs. M. L. House, appellant, and Road Improvement District No. 5, and R. E. Bartlett, Sheriff, of Conway County, Arkansas, appellees, wherein was drawn in question the validity of a statute of and an authority exercised under said state on the ground of the statute and authority exercised under it being repugnant to the Constitution of the United States and the decision was in favor of the validity of the statute and the act of the state thereunder, and wherein a right, title, privilege and immunity was claimed by the said Mrs. M. L. House under the Constitution of the United States, and the decision was against the right, title, privilege and immunity especially set up and claimed under said Constitution, a manifest error hath appeared to the great damage of the said Mrs. M. L. House as by her complaint it appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this, the 4 day of June, 1923.

Sid B. Redding, Clerk of the United States District Court for the Eastern District of Arkansas, By W. P. Feild, D. C.
(Seal of the United States District Court, Eastern District of Arkansas.)

Allowed by E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 87] STATE OF ARKANSAS, ss:

SUPREME COURT

CERTIFICATE OF LODGMENT

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on June 4, 1923, in the matter of Mrs. Mary L. House, versus Road Improvement District No. 5 and R. E. Bartlett, Sheriff of Conway County, Arkansas—

1. The original bond of which a copy is herein set forth.

2. Four copies of the writ of error, as herein set forth, one for each defendant, and one to file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this June 16th, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas, By ——, Deputy Clerk. [Seal of the Supreme Court of Arkansas.]

[fol. 88] IN SUPREME COURT OF ARKANSAS

CITATION AND SERVICE—Filed June 16, 1923

The United States of America to Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Arkansas, wherein Mrs. M. L. House is plaintiff in error, and Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Supreme Court of Arkansas, this 4 of June, 1923.

E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas. Attest: W. P. Sadler, Clerk of the Supreme Court of Arkansas, By J. H. Campbell, D. C. [Seal of the Supreme Court of Arkansas.]

We acknowledge receipt of copy of attached citation, and waive formal service thereof.

Given under our hands this 15th day of June, 1923.

J. W. Johnston, Attorney of Record for Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, Sheriff.

[File endorsement omitted.]

[fol. 89] UNITED STATES OF AMERICA, ss:

SUPREME COURT OF ARKANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings, as called for in the stipulation filed herein, in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this June 16, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas, By ——, Deputy Clerk. [Seal of the Supreme Court of Arkansas.]

Costs of Suit

Costs in chancery court	200.00
Costs in Supreme Court	56.50
Costs, pursuant to writ of Error	28.00

Paid by Hill & Fitzhurgh for Plaintiff in Error.
Attest: W. P. Sadler, Clerk Supreme Court.

Endorsed on cover: File No. 29,694. Arkansas Supreme Court. Term No. 384. Mrs. M. L. House, plaintiff in error, vs. Road Improvement District No. 5 of Conway County, Arkansas, and R. E. Bartlett, sheriff of Conway County, Arkansas. Filed June 22nd, 1923. File No. 29,694.

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1923

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 5 OF CONWAY COUNTY, ARKANSAS, AND R. E. BARTLETT, SHERIFF, OF CONWAY COUNTY, ARKANSAS.

STATEMENT

This case presents all of the questions which are presented in the companion case submitted with it of Mrs. M. L. House vs. Road Improvement District No. 2 of Conway County, with additional questions presented herein, wherein the Judges of the Supreme Court divided three to two as to whether the action of the Legislature was so arbitrary in the creation of this District that it amounted to taking of the plaintiff's property without due process of law.

In order to save a duplication of work for court and counsel, we are serving counsel in this case with our brief in the No. 2 case, as well as the brief in this case and will merely call attention herein to the differences between this case and the No. 2 case in so far as the questions heretofore discussed are concerned and will present fully the questions that are peculiar to this case.

Act No. 245 of 1919 created four road districts in Conway County. The procedure in each District is the same, the Act specifying the territory embraced in each District and creating the District for it, the balance of the Act being common to all of them.

Therefore the form of notice in this case is identical with the form of notice in the No. 2 case, each being a copy of the form of notice specified in the Act. The notice here given is copied at page 1; it is dated July 21, 1919, and calls for a hearing on the 12th day of August at the county court house, of Conway County, without specifying its location, and states that any complaint of any assessment must be filed with the Secretary of the Commissioners in writing before the date of the hearing.

This notice was published in the Conway County Unit on July 23rd and July 30th; these being the only official publications, as the Act provides that the last shall be ten days before the day of hearing, but in addition to these official publications, it was also published August 2, 6 and 12th. (R. p. 6.) Computing the notice as prescribed by the statute there were 18 days actual notice given (R. p. 6).

This District proceeded, as did the No. 2 District, by taking the 1917 assessment as the basis of valuation. This District created six zones and classed all lands which were in another District as in the 6th zone and so classed the plaintiff's land and assessed it at 100% of its county valuation (R. p. 9).

Mrs. House' entire property was assessed on the 1917 assessment at $43,030.00 and was reduced to $30,320.00, which reduction was entered of record on June 12, 1919 (R. p. 10). The assessment in this case was made by the Commissioners on July 19, 1919 (R. p. 6). Therefore the 1917 assessment containing the reduced valuation was of record one month and one week before this assessment was made on the 1917 assessment as the basis.

The plaintiff's land in this district was 960 acres; of this, 300 acres was good land, comparable to the best in the vicinity in value; 150 acres in cypress brakes and sloughs, and 400 of low, wet, bottom land of little value, and could only be reclaimed by the expenditure of large sums of money for levee purposes; there were no houses of considerable value on the land. $1,000.00 would be an excessive valuation for all the improvements (R. p. 10).

The allegations as to the discrimination are the same in this case as in the No. 2 case. In effect being, that in many instances much better land than the plaintiff's and lying within the levee district, protected from overflows, are assessed much less than her lands of less value are assessed. That other lands immediately adjacent to hers and of like character and value are assessed much lower than hers (R. p. 10).

These additional questions were presented in this case: It is alleged, and a demurrer to these allegations was sustained, that the inclusion of the plaintiff's land in the District was an arbitrary exercise of legislative power and void as such because the assessment of any benefits whatever against her lands for the construction of the im-

provement provided in the Act is arbitrary and without any just basis, as her land situated in the District is not, and cannot be benefited by the improvement provided in the Act.

That the improvement provided in the Act is for the construction of a road beginning at the town of Plummerville and running thence in a north-easterly direction to the town of Springfield and continuing in a general north-easterly direction to the Conway-Faulkner County line, and for a road beginning at Springfield and running in a genaral northerly direction, and a lateral beginning about two miles north of Plummerville and running easterly to the Conway-Faulkner County line. That Plummerville is two miles from her land and the lateral is two miles from her land. Her land is southeast of Plummerville.

That between the lateral and her land lies the main line of the Missouri-Pacific Railroad and the public road to be improved in District No. 2 running from Plummerville east to Menifee. That all trade, traffic and other communication from the defendant's land and its vicinity goes either directly to Plummerville or to some point on said Road No. 2 to reach Plummerville, and there is no communication between her lands in a business, or in any other way, with the road running north from Plummerville. That the road running north from Plummerville and its laterals are beneficial to the country which they traverse and to the town of Plummerville, but are of no benefit whatever to the present or future use of plaintiff's land, and that the imposition of assessments on plaintiff's land results in taking her property to pay for improvements on other people's property, and to help construct roads in other parts of the county which from their nature and future use would not be used by the owner or occupants of plaintiff's land (R. pp. 11, 12).

This allegation is amplified in an amendment to the complaint wherein it is stated that except immediately adjacent to Plummerville that no benefit can accrue to the land situated south of Plummerville by the improvement of said road. That the plaintiff has 160 acres of land situated in Section 21, the nearest part thereof being approximately two miles and the furtherest 2½ miles from Plummerville south and east of said town. That the remainder of the plaintiff's lands are situated in Sections 22, 23 and 24—a distance from 3 to 5¼ miles south and east of Plummerville. That the District extends only a distance of 1¼ miles (a typographical error

makes it read 2½) south and west of Plummerville, and lands situated equidistant from Plummerville south and west thereof as are the lands of plaintiff in Sections 22, 23 and 24, are situated south and east of Plummerville, are arbitrarily excluded from said District; and if the plaintiff's land has any benefits from the said District all land equidistant in the opposite direction from Plummerville has an equal benefit, and no burden is placed upon same. (R. p. 14).

Plaintiff further alleged that her lands in the District are separated from the rest of the District by Gap Creek, lakes and bayous and the Missouri-Pacific Railway and the improved roads in District No. 2 and that the roads in District No. 5 cannot be used from the lands of the plaintiff without going to Plummerville, a distance of from 2 to 5½ miles from her land, and lands similarly located south and west of Plummerville are not included in said District and there is access from those lands to the roads of said District.

That the District extends easterly from the improved road at Plummerville a distance of 7½ miles, whereas on the west side where there will be equal benefit from the improvement of said road, the District extends from 1½ miles, thereby arbitrarily including a large area on the east side and excluding a large area similarly situated and benefited on the west side, if the said area on the east side is benefited, from said District (R. p. 14).

It is further alleged that access cannot be gained to the improved roads from plaintiff's land without going out of the District and traversing land that is not included in the District, but nearer to the improved road than her land (R. p. 14, 15).

The trial court sustained a demurrer to all of the allegations of the complaint, except on the questions as to whether the Commissioners had abandoned the construction of the Shaw's Bridge lateral and the question whether the Legislature acted arbitrarily in including plaintiff's land in the District and excluding other lands (R. p. 27).

The attack on the validity of the assessment based on the allegation that the Shaw's Bridge lateral had been abandoned presented a matter of construction of the State law and prior decisions of the court on that subject and is not subject of review here, and hence the evidence on that subject is not preserved.

The testimony in regard to the arbitrary act of the Legis-

lature was preserved and the substance of it is set forth in the stipulation (R. p. 2).

The testimony introduced and heard on the issue as to the arbitrary action of the Legislature was in substance as follows: "A map was introduced in evidence showing the lines of the District and the roads to be improved therein; a reduced copy of it is attached as "Exhibit A" and explanatory evidence of said map to the effect that the physical conditions on either side of the improved road were similar, and that the physical conditions southeast of Plummerville were the same as at an equidistant southwest thereof, and testimony was adduced tending to show that the plaintiff's lands in Sections 21 and 22, township 6 north, Range 15 west were separated from the improved roads, the nearest point upon the improved roads, the nearest point upon the improved roads being the town of Plummerville, by Gap Creek and cypress brakes and swamps.

That the only practical route of travel from said Sections 21 and 22 to reach Plummerville is to pass without the District and to go south into Section 28 and then strike a road leading into Plummerville, through said Section 28 and through Section 29 and Section 30, which said Sections 28, 29 and 30 are out of the District and pass back into the District in Section 19, in which Plummerville is situated, or go south without the District into Section 28, and strike another road leading east through Sections 28, 27 and 26 to Menifee, which said Sections 28, 27 and 26 are without the District and from Menifee to travel the public road of District No. 2 into the town of Plummerville and then reach the improved road of District No. 5; that there is no feasible or practicable route, owing to the topography of the land and the physical condition of the creeks, brakes and swamps, to reach the improved road in District No. 5 from said Sections 21 and 22, without excessive expense in bridging and constructing embankments, other than through said routes aforesaid. A map of said District, which was introduced in the trial of this cause, is attached hereto and marked "Exhibit B."

That testimony was introduced by defendant District tending to controvert testimony offered by appellant on this issue that the Chancellor decided this issue in favor of the District, but the Supreme Court in passing on same, has this to say: "The south boundary line of said District No. 5 is the south line of Sections 19, 20, 21,, 22, 23 and 24 in Twp. 6-N., Range 15 W., in Conway County. A part of appellant's land were located in Section 21 in said District. Appellant alleged

and made proof that, on account of Gap Creek and cypress brakes, the only practical route from said lands in Section 21 to the improved roads in said District is to cross the south boundary line thereof and pass over lands not included in the District, and a part of which was nearer the improved road than appellant's lands." (R. pp. 2, 3.)

Hence we have the statement of the majority of the court that the plaintiff made proof of the allegations that on account of Gap Creek and cypress brakes the only practicable route from plaintiff's lands to the improved road in the District is to cross the south boundary of the District and pass over lands not included in the District, part of which are nearer the improved roads than plaintiff's lands, and we have a statement in the dissenting opinion as follows:

"The undisputed facts show that the lands of appellent are separated from direct connection with the proposed road by lakes and brakes which are impassable. The evidence shows that it would not be practical to construct bridges over this impassable way and the only practical route for appellant to use the improved road is to leave her land and go upon adjoining lands in order to reach the road." (R. p. 35).

ASSIGNMENT OF ERROR

Now comes Mrs. M. L. House, Petitioner herein and Plaintiff in Error, by her attorneys, Joseph M. Hill, and Henry L. Fitzhugh, and in connection with her petition for writ of error makes and declares the following assignment of errors, to-wit:

First. The Court erred in deciding that the notice authorized by Act 245 of the General Assembly of 1919, which notice provided for a publication once a week for two weeks of the hearing upon the assessments of benefits levied against real property in the District, and which notice in this case was published in a weekly newspaper in Conway County, Arkansas, in its issue of July 23rd, and 30th, 1919, advising all persons to file their objections to their assessments in writing before August 12, 1919, and stating upon which date the Commissioners would hear and determine such objections so filed in writing before said date, was due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States.

Second. The Court erred in deciding that the notice in the

form prescribed by Section 20 of Act 245 of 1919 which is as follows:

"Notice of the Assessment of Benefits in Road Improvement District No..... of Conway County, Arkansas.

Notice is hereby given that the assessment of benefits and damages in Road Improvement District Number.....of Conway County has been completed and is on file with the Secretary of said Commissioners, and is open for inspection, and a copy of said assessment of benefits and damages is on file in my office and open to inspection and that the said Commissioners for said District will on the.....day of....., ..., attend at....., Conway County, for the purpose of hearing any complaints against any of said assessments of benefits or damages.

Any complaint of any of said assessment of benefits must be filed with the Secretary of said Commissioners in writing before the date of said hearing."

And which notice was given in the above form in this case, said form being filled in by inserting the number of the District, the name of the clerk and the date and place of the hearing, constituted such notice as complied with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third. The Court erred in deciding that the system of levying special assessments as pursued by the Commissioners of the defendant District acting under said Act 245 of 1919, when applied to the assessment of the appellant's property was valid, instead of holding the same to be arbitrary under the facts herein and in not holding the same to be arbritary under the facts herein and in not deciding that the said action of the Commissioners in applying the system which they did apply under authority of said Act 245 amounted to taking the plaintiff's property without due process and deprived her of equality before the law.

Fourth. The Court erred in deciding that said Act 245 of 1919, creating the defendant District was not an arbitrary act of the Legislature in that it excluded benefited lands and included lands not benefited, thereby taking appellant's property to pay for public improvements without compensation and depriving her of her property without due process of law.

Fifth. The Court erred in deciding that Act 245 of 1919, creating the defendant District was not an arbritary act of the Legislature in that it excluded benefited lands and includ-

ed lands, if benefited at all, less than excluded lands similarly situated to appellant's land, and if the appellant's lands were benefited, necessarily the excluded lands similarly situated were benefited, thereby denying the appellant equal protection of the law and taking her property without due process.

Sixth. The Court erred in deciding that notwithstanding the evidence established that part of appellant's lands were inaccessible to the improved road without going outside of the District and through lands nearer the improved roads than her land, which lands were not included in the District, because it held that the Court could not decide that the action of the Legislature in creating the District including her lands was arbitrary, and that such action deprived plaintiff of her property without due process, and denied her equal protection of the law, as it held that it could only so decide when the facts so appeared from the face of the Act itself, or from facts of which the Court took judicial notice.

By reason whereof, this petitioner and plaintiff in error prays the decision of the Supreme Court of Arkansas may be reversed and justice done. (R. p. 38).

THE ASSESSMENTS ARE VOID, BECAUSE NO BENEFITS RECEIVED

Although fully presented in the complaint, to which a demurrer was sustained, and stressed in printed brief and oral argument, the Supreme Court did not discuss the allegation that there was no benefit whatever to Mrs. House' lands by reason of the construction of the improvement. The reason that there was no benefits was set forth in detail in the complaint and its amendments, showing that the improved road ran away from her property and served no useful purpose in the present or in the future of it, or its occupants.

In this respect this case differs from the No. 2 case wherein it is alleged that the benefits are excessive and discriminatory, but is is not alleged that there was no benefit to her land by the construction of the No. 2 road.

The Supreme Court of Arkansas in a carefully written opinion by the present Chief Justice, then Mr. Justice McCulloch, in St. Louis S. W. Ry. Co. vs. Board of Directors of Red River Levee District No. 1, 81 Ark., 562, drew the distinction between a Legislative determination of benefits where there was some benefit, but not to the extent assessed,

and where there was no benefit, holding that the former was impervious to attack, while the latter under the principle in Norwood vs. Baker, 172 U. S. 269, not modified by later decisions therein referred to, could be relieved against in equity. In that particular case the Court went into consideration of the facts and found that according to the weight of the testimony there was some benefit to the property by reason of the improvement, and therefore the doctrine of Norwood vs. Baker did not apply.

Shortly after this decision another case was presented to the Court, wherein the allegation showed no benefit whatever; Coffman vs. St. Francis Drainage Dist., 83 Ark., 54. In fact the allegations of the bill there were quite general, not near as detailed as in the case at bar, but they were sufficiently definite for the Court to hold that if the allegations were proved true, that the plaintiff would be entitled to relief in equity.

This case has never been overruled, in fact has been much cited and quoted from in later decisions, even in these road district cases. In Bush vs. Delta, Road Improvement District, 141 Ark., 247, it is approved and classed with Myles Salt Co., vs. Board of Commissioners, 239 U. S. 478, as a class of cases wherein the Courts grant relief where the assessments are without benefit to the land, because such would be taking property without due process and denying equal protection of the law.

Again in Burr vs. Beaver Dam Drainage Dist., 145 U. S. 51, it is again approved as stating a principle wherein the Courts will grant relief, because otherwise it would be confiscation of property without benefit.

In the opinion in the No. 2 case the Court invoked against the plaintiff's charge of excessive and discriminatory assessments the limitation in the Act within which the land owner might complain (R. p. 34).

Therein the Court cites the recent cases to the effect that the method provided in the statute for attacking the validity of assessments of benefits is exclusive and that it must be pursued within the time prescribed by the statute (R. p. 35).

We presume that the Court intended this to be the answer to the attack in this case that there were no benefits whatever from the improvement of the road in the No. 5 District to the plaintiff's land, although the opinion in this case is silent on that proposition.

We have then before the Court this situation: Constructive notice is given for 18 days for a hearing before the Board of Commissioners and the property owner may file before the Commissioners complaint of his assessment and it is made the duty of the Commissioners to hear the complaint and to consider the assessment and if they find any assessment of benefits is inequitable or unjust, they shall correct the same.

Does such a notice and such proceeding preclude the landowner from an attack in equity of an assessment of benefits where there is no benefits whatsoever to his land? This notice and this proceeding before the Commissioners clearly does not contemplate a hearing on the basic fact of no benefit whatever, which is a hearing on the question of confiscation; but contemplates a hearing to correct inequality and injustice in the assessment of the landowner as compared with other assessments. The statute provides that any landowner who has complained in writing of his assessment before the Board and feels aggrieved by the action of the Board may file a complaint in equity within ten days. Section 21 of the Act (p. 22 of the No. 2 record).

The Court in construing this Section eliminated the provision that the landowner must have complained in writing before the Commissioners before he would have a right to file this suit. (p. 31 of No. 2 record).

Therefore under the decision as rendered construing this Act any landowner in this District had ten days from the date of hearing before the Commisisoners to bring a suit in Chancery to attack the assessment. This is the only remedy provided in the Act wherein the landowner could obtain relief in court from an assessment which amounted to confiscation of his property in that there was no benefit to his property from the improvement.

Therefore under the decision, construing the right of landowners to raise this question in the court, it is limited to the ten days given in Section 21 of the Act. Is that due process?

The notice prescribed in the Act and the notice which was actually given does not inform the landowner that he has a right to file a suit within ten days after the hearing before the commissioners: but on the contrary the notice on its face would indicate that the sole remedy of the landowner is for a hearing before those Commissioners, and certainly the landowner had a right to take the notice on its face to mean exactly what it said, and no more.

The Supreme Court of Arkansas has held that where the integrity of the District is attacked that such suit does not come within the provisions limiting the time for reviewing assessments of benefits.

Phillips v. Tyronza & St.Francis Road Im.Dist.,145 Ark.457.

According to the face of the notice and the term of the Act, if Mrs. House had received this notice on the day after the hearing, not having filed her complaint in writing the day before the hearing, under the terms of it she would have no right to bring the suit in equity, and certainly the later construction of the Act opening that right to her under those circumstances cannot change the effect of the notice itself. We submit that the Myles Salt Co., case hereinafter reviewed sustains the right to maintain this suit irrespective of the ten day limitation in the Act.

THE LEGISLATIVE ACT ARBITRARY IN THE FORMATION OF THE DISTRICT AND IN INCLUDING PLAINTIFF'S LANDS

This proposition resolves itself into two distinct subjects which were discussed by the majority and minority opinions of the Court, and upon each of which the Supreme Court of Arkansas is divided three to two, as to whether the legislative action in each respect amounted to an arbitrary exercise of power which denied the plaintiff the equal protection of the law and took her property without due process.

First: In Ruddell vs. Rutherford, 145 Ark. 49, the facts were that the Legislature eliminated from a road district a section of land and left within the road district lands from which to reach the improved roads in the District, travel would have to be over the excluded lands.

This was because of the topography of the country, it not being practicable to go from the included lands to the roads without traversing the excluded lands.

The Court held that it was apparent that this excluded land would be benefited by the improvement if the included land would be benefited, and by eliminating this Section 18, the excluded land, the Act of the Legislature was arbitrary and discriminatory on its face, and therefore void. There were earlier decisions of the Supreme Court applying the same principles which are cited therein. Exactly the same situation was present here. An examination of the map of the District (p 2½ of the record) will make this clear.

The crosses in Section 21 show Mrs. House' land nearest the improved road. The undisputed evidence, and which was accepted as proof by the majority of the court, shows that between Section 21 and the town of Plummerville, where the

road begins, there are creeks, cypress brakes and sloughs, which render it impossible to reach Plummerville and the improved road without going out of the District and traversing Sections 29 and 30, which were excluded from the District and which are nearer to the road than Section 21, and necessarily if there was any benefit to Section 21, there is more benefit to Sections 29 and 30, which were excluded. The same is likewise true of her land further east.

Instead of applying the principle of Ruddell vs. Rutherford to the instant case the Court drew this distinction; that the Courts only declare a Legislative action arbitrary where the invalidating facts appear upon its face or from matters of which the Court may take judicial notice.

The Court stated that the impasse in the Ruddell case was an island and a navigable stream, of which the Court took judicial notice (R. p. 31). However it will be seen from an examination of the case of Ruddell vs. Rutherford that no such point was made in the opinion.

The opinion of the Court here admits that if it could take judicial cognizance of what the undisputed evidence established, or if what is indisputably established appeared on the face of the Act, that it would declare these assessments void as not affording Mrs. House equal protection of the law and taking her property without due process; but because the invalidating facts are developed in evidence which the Court accepts as true, yet such relief cannot be granted.

This limitation upon the right of the Courts to protect property from confiscation has so far as we are able to discover never before been invoked either by the Supreme Court of Arkansas, or this court. In fact, no court has gone further heretofore than the Supreme Court of Arkansas in sustaining the constitutional right and duty of the Courts to avoid a statute of a State which deprives a person of his rights under the Federal Constitution.

No sounder statement of the principle can be found in any court than in the opinion of the present Chief Justice, than Justice McCulloch, in the case of Louisiana & Arkansas Ry. Co., vs. State, 85 Ark., 12. In that case the Legislature passed an Act requiring the Railway Company to establish and maintain a depot at Snow Crossing in Columbia County, Arkansas. The Company refused to construct it and was indicted under the terms of the statute. The Railway Company filed a plea that there was no public necessity calling for the establish-

ment of such a station and that because of the topography of the country it would be impracticable except with very great expense to provide side tracks and passing tracks at said point, and offered testimony to prove its allegation, but the Court refused to hear the evidence and fined the Railway Company and it appealed. The Supreme Court, after quoting from Norwood vs. Baker that "There is a point beyond which the Legislative Department, even when exerting the power of taxation may not go inconsistently with citizens' right of property." Said, "That principle is applicable here. When the Legislature passes a special act requiring the doing of a certain thing, such as the establishment and maintenance of a station at a given place by a railroad corporation, there may be a judicial question presented whether or not a real necessity exists for the doing of the thing in order to reasonably serve the public convenience. It is a question primarily for Legislative determination, and that determination should not be disturbed by the Court unless the power has been exercised arbitrarily and without reason. In other words, the Legislative determination should be and is conclusive unless it is arbitrary and without any foundation in reason and justice.

There may be cases where the power is exercised so arbitrarily and unreasonably that the Court should declare, as a matter of law, that the Legislature exceeded its power, and that the Legislative determination should be disregarded.

This principle is, we think, clearly recognized by the decisions of the Supreme Court of the United States in the cases involving the validity of Legislation directly fixing rates for transportation of passengers and freight. Dow vs. Beidelman, 125 U. S. 680; St. Louis & S. F. Rd. Co. vs. Gill, 156 U. S. 649; Chicago & G. T. Ry. Co. vs. Wellman, 143 U. S. 339; Smyth vs. Ames, 169 U. S. 467, Covington & L. Turnpike Co. vs. Sandford, 164 U. S. 578.

The application of the principle is necessarily somewhat different in the case of a general rate-making statute from a statute imposing duties like that imposed in this case, but the principle is the same.

This brings us to a consideration of the question whether or not the appellant in this case offered to bring to the attention of the Court facts sufficient to show that there is no public necessity for a station at Snow Crossing, and that the requirements of the Legislation in that respect are so arbitrary and unreasonable as to demand a judicial review so as to relieve the railroad company from compliance therewith.

The rejected evidence tended in substance to show that there was no public necessity at all for the maintenance of a station at Snow Crossing; that the land around that place which is not a point of intersection of two railroads, but is only the crossing of a country road over the railroad, is principally wild, uncultivated and sparsely settled; that there is such a heavy natural grade at that point on the road as would not only render it very expensive to build side tracks, but would add greatly to the danger of accidents in stopping trains; that there is now a flag station on appellant's line two and a half miles north of Snow Crossing, and also a regular station four and a half miles south of Snow Crossing, where there is a depot building and where a telegraph operator and passenger and freight agent is kept; that these two stations provide suitable, convenient and ample transportation facilities to the people near Snow Crossing; and that the cost of erecting and maintaining a station at that place would be greatly in excess and out of proportion to the revenues which could possibly accrue from the business at that place, and that the station would have to be operated at a monthly loss to the company.

Now this evidence tended to show that there is no public necessity for a station at the place named, and the Court should have heard and considered it for the purpose of determining whether or not the statute was a valid exercise of power by the Legislature."

And further the Court stated:

"The utmost force must be given to the Legislative determination of the necessity for a station and the reasonableness of requiring the company to erect and maintain one; but appellant presented a question for judicial review, and for the Court to refuse a consideration would be to deny it the equal protection of the law, and would, in effect, be depriving it of its property without due process of law."

Then the Court passed to the exact question determined here, whether this was a question of law, or one of fact, and decided it was a question of law to be determined from the facts adduced before the Court, and further held that the Court was not bound by the facts presented, but it should possess itself of all the information obtainable before it undertakes to set aside an enactment of the Legislature and on this subject cites Chicago etc. Ry. Co. vs. Wellman, 143 U. S. 339.

In reinforcing the reasoning of the conclusion reached, the

Court used as an illustration the power of the Legislature over the subject of special taxation for local improvements which it stated was unquestioned, but reannounced the doctrine of Coffman vs. St. Francis Drainage Dist., 83 Ark., 54, which holds that that power when exercised arbitrarly and unreasonably is not beyond judicial control; and as in the Coffman case, the Court returned the case to the trial Court for the evidence to be developed on the allegations which charged, in effect, confiscation.

Hence it was unquestionably the law of Arkansas that in deciding rights under the Federal Constitution, until this case was decided, that the Court heard evidence and from that evidence announced the law as to whether the Act was arbitrary or valid, and did not consider itself precluded from going into evidence, and as now confining the determination to the face of the Act and matters of which it took judicial congnizance.

In other cases presenting this exact question of whether an Act of the Legislature was arbitrary in including land and excluding land the Court heard and determined issues on the evidence presented in Sadler vs. McMurtrey, 152 Ark., 621; Neterer vs. Dickinson, 153 Ark., 5.

Hence when the Court has in this instance departed from its settled principle of declaring void Legislation when invalidating facts show that the Legislation impairs rights under the Constitution of the United States, we have a right to appeal to the clear statements heretofore announced by the Supreme Court of Arkansas on the duty of the courts in these matters, as conclusive on this subject. But this Court has so thoroughly settled this question it is unnecessary to show that the Supreme Court of Arkansas was, until this decision, of the same mind.

In Rowland vs. Boyle, 244 U. S. 106, a stockholder of a railroad company filed a bill in equity and attacked a statute of Arkansas, fixing a two cent passenger rate and orders of the Arkansas Commission fixing freight rates.

The Railroad Company presented a complicated and intricate system of accounting which if accepted as correct, showed that the rates prescribed by the Legislative act and by orders of the Commission, were confiscatory.

The writer of this brief urged upon the Court that the evidence was not sufficiently clear to justify it pronouncing invalid an act of the Legislature and orders of the Commission

within the rule announced in Allen vs. Railroad, 230 U. S. 553, but the Court thought otherwise, and while pointing out these were errors in the system of accounting, yet taken as a whole the Court was of opinion that the railroad had shown successfully the rates to be confiscatory.

These invalidating facts were entirely shown by parol evidence, much of it opinion evidence. Had this new rule of the Arkansas court prevailed here, the statute, being fair upon its face and the facts presented not being those of which the Court took judicial notice, it, at least, would have been saved from annulment.

There is no difference in principle and very little in fact between this case and Myles Salt Company vs. Iberia & St. Mary Drainage District, 239 U. S. 478. In that case the police jury of Louisiana proceeding strictly according to the local statutes, created a drainage district and included therein Weeks Island, which was valuable for salt deposits; it rose to a height of 175 feet above sea level, whereas the surrounding country was only 15 feet above sea level. There was no need of drainage of Weeks Island, in fact the problem there was to guard against washing and erosion. All of the statutory requirements were strictly complied with, but when the drainage district sought to collect the taxes the owners of this land sought to enjoin their collection, on the ground that the drainage system was no benefit to the plaintiff's lands and was formed only for the benefit of the other lands and was an usurpation of authority, and was an effort to take plaintiff's property without due process of law.

The Supreme Court of Louisiana held that the creation and determination of drainage districts being a legitimate and lawful exercise of discretionary powers, the Courts were without power to impugn or inquire into motives where no fraud was pleaded.

The Louisiana court went to the extent of holding that local authorities had an absolute right to organize drainage districts and give them shape and boundary lines as they choose, unless there was some element of fraud in their creation and the Court would not entertain an attack upon the lines of the District and the assessments levied therein in the absence of fraud.

That case, as this one, was disposed of on a demurrer to the complaint which invoked the protection of the Federal Constitution. This Court decided it could not concur in the views

expressed by the Louisiana court and stated that it was true that the law of the State as written was not attacked, but the law as administered and justified by the Supreme Court of the State was attacked.

In unanswerable reasoning this court decided where an improvement district is so formed to include property which cannot be directly benefited, including it only that it may pay for the benefit to other property, is an abuse of power and act of confiscation.

While arising in a different way, yet it is quite pertinent to this discussion, to call attention to K. C. S. Ry. Co., vs. Road Improvement District No. 6 of Little River Co., Arkansas, 256 U. S. 658. This was another case of arbitrary exercise of power in the levying of assessments clearly for the benefit of other land. It may be interesting to note in connection with this case that the arbitrary assessment therein was sustained by a three to two decision of the Supreme Court of Arkansas, 139 Ark., 424, and that Justices Wood and Hart, who dissented in this case, dissented in that case, and their ground of dissent is exactly the reason which are elaborated by Mr. Justice McReynolds in delivering the unanimous opinion of this Court sustaining the view which they expressed in the Supreme Court of Arkansas.

The majority of the court, as stated refused to declare this act as administered by the Board to be unconstitutional, on the ground that the invalidating facts did not appear on the face of the Act, or from matters of which the Court may take notice and stated that the Federal cases relied upon, Houck vs. Little River Drainage District, 239 U. S. 255, and Myles Salt Co., vs. Iberia, etc. 239 U. S. 478, recognized that distinction. (R. p. 32). For that reason we have gone more tediously into an analysis of the facts in the Myles Salt Co. case than otherwise we would have done, as an examination of it shows conclusively that the majority opinion was in error in stating that this court refused to invalidate legislative action unless the invalidating facts appear on the face of the act, or from matters of which they took notice; all the facts were developed by parol testimony.

The Houck case did not reach to this point at all, but merely decided a question of preliminary expense in local improvement districts. We conclude the discussion on this subject by quoting from the opinion of Justices Wood and Hart as follows: "With reference to the facts showing the arbitrary action of the Legislature but little need be said. The un-

disputed facts show that the lands of the appellant are separated from direct connection with the proposed road by lakes and brakes which are impassable. The evidence shows that it would not be practical to construct bridges over this impassable way and the only practical route for appellant to use the improved road is to leave her land and go upon adjoining lands in order to reach the road.

This brings the case directly within the rule announced in Ruddell vs. Rutherford, 145 Ark., 48, and other cases of like character.

We concede the general rule to be that if the Legislature has fixed the boundaries of the District and laid the special tax or provided for a subordinate agency to do so, its action must in general be deemed conclusive. To invoke the intervention of a court against the result of its conclusion is to invoke judicial authority to give its judgment controlling effect over that of the Legislature in a matter of the apportionment of a special tax, and this can only be done where the Legislative action is manifestly colorable and arbitrary. This is the basis of our holding in Ruddell vs. Rutherford, supra.

In that case the Legislature eliminated Sec. 18, and thereby determined that it was not benefited by the improvement. It included Sec. 19 in the District, thereby concluding that it was benefited. It appeared from a map introduced in evidence that it was impractical to go from Sec. 19 to that part of the District where the improved road was without passing through Sec. 18. Hence the statute was held to be arbitrary and discriminatory on its face.

The Court was not concerned about the method of proof. Because the Act on its face was discriminatory was not the fact which gave the court jurisdiction. The arbitrary and discriminatory action of the Legislature was what made the exception to the general rule and gave the court jurisdiction in the premises. This is illustrated by the case of Little Rock vs. Katzenstein, 52 Ark., 107.

In that case the Court held that the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake.

The Court said that a demonstrable mistake of fact, meaning by this expression, a mistake of fact as to the existence of which there was no room for doubt. If no such limits exist, the power of local assessments would be but another

means for arbitrary exaction and in such cases the wrong must always be open to correction."

Second. The next contention considered by the Court on this subject was that the act on its face designating the lines of the district made an arbitrary selection of included and excluded lands and was therefore void as depriving plaintiff of the equal protection of the laws and taking her property without due process.

An examination of the map of the District itself, shown at page 2½ of the Record, and the evidence shown at page 2 demonstrates the soundness of this position.

The physical conditions southeast of Plummerville were the same as at equidistant southwest, and the physical conditions on either side of the improved road were similar. This map shows that the District was from one-half mile to one and a half miles wide on the west side at Plummerville, and for some distance north of it, and extends seven miles on the east side, the District only extends at Plumlerville, the southern terminus of the road, one and a half miles west and directly east—seven miles.

Sections 25, 29 and 30 south of Plummerville are all nearer the road than any of Mrs. House' lands situated in Sections 21, 22 and 23, and lands in those Sections were accessible to the roads, whereas her lands are not accessible, and to reach the road from her lands it is necessary to pass out of the District and back into it. Traveling north, the District runs to an attenuated narrow District a half mile long at one place and varying lengths at others.

Take the situation at the town of Plummerville, only one and a half miles west of it is included subject to taxation, whereas seven miles east of exactly the same character of country and physical situation is taxed. Quite a similar situation was presented to this court in Gast Realty & Inv. Co. vs. Schneider, 240 U. S. 55, and was thus disposed of by this court.

"The ordinance, following the charter as construed established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near 500 feet when it encountered such a tract, and on the opposite side of the street was 150 and 240 feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied.

The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations, applicable to the parcels taxed, but in blind obedience to a rule that requires the result."

In Thornton vs. Road Improvement District No. 1 of Clark County, Arkansas, 291 Fed. 518, the Circuit Court of Appeals of the Eighth Circuit had before it the assessments made in a road district created by special Act of the Legislature of 1919. The case was decided by Judges Sanborn and Kenyon, Circuit Judges, and Symes, District Judge, Judge Sanborn writing the opinion of the Court.

The facts showed that there was a road district created in Clark County under a Public Act No. 338 of 1915, generally known as the Alexander Road Law, but that a lateral road into this District was created under Special Act No. 374 of 1919, and it was the assessments levied under the Special Act which were under consideration by the court.

The property owners in that case were non-residents and had no actual knowledge of the levying of these assessments until long thereafter. The assessment in this case was also attempted to be cured by special act of the Legislature. One of the matters considered was the arbitrary assessment of property against the landowners, while property of other landowners abutting to and in the vicinity of part of the land in controversy was assessed nothing and subject to no taxes for the construction of the road.

The case of Gast Realty & Investment Co. vs. Schneider, Granite Co., 240 U. S. 55, was cited and the principle announced therein quoted from in support of the principle that where a special assessment is applied in such way as to result in disproportionate taxation of lands fronting on the improvement, that it is void, as conflicting with due process of law; after stating that principle, the court decided it would not sustain an assessment of benefits, based under a law which required and resulted in the assessment of benefits to and taxation of lands within five miles of each side of the east eleven miles of a road 26 miles long for the entire cost of the road, and the exemption of lands on either side of the west 15 miles of that road from any assessment of benefits

whatever and from the payment of any taxes on account of that improvement.

The facts here are worse than the facts there; here property within a mile of the improved road was exempted from taxation, while property from two to seven miles away from it is taxed; and to get the benefit of the road by the land thus taxed it is necessary in order to reach the road to go without the limits of the road and pass through this untaxed land—surely a worse case than either the Gast Realty Company case or the Thornton case.

Again we quote from the dissenting opinion of Judge Wood and Hart:

"But here again there is a well known exception to the general rule and that is that the Legislature cannot act in an arbitrary, discriminatory manner in fixing the boundaries of a district.

In concluding this discussion on this branch of the case the majority opinion gravely adds that this court is firmly committed to the doctrine that improved roads must necessarily have termini, and the improvement districts, boundaries. This is so in the very nature of things, but it does not follow that the legislature can not act arbitrarily in fixing the boundary without its action being reviewed by the courts. There, as here, the testimony is all one way and shows that the Legislature acted arbitrarily and in discriminatory manner in fixing the boundaries of the District. The court should declare as a matter of law that the creation of the District was invalid, and any assessments levied under it an illegal exaction. To hold otheriwse is to deprive the landowner of his property without redress."

Respectfully submitted,

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No. 384

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 384, OCTOBER TERM, 1923

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT NO. 5
OF CONWAY COUNTY, ET AL.,
DEFENDANTS IN ERROR

REPLY BRIEF OF PLAINTIFF IN ERROR

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REPLY BRIEF OF PLAINTIFF IN ERROR

THE LEGISLATIVE ACT ARBITRARY

This contention embraces two distinct propositions:

(a) The one first discussed in the brief of defendant in error, which is the one last discussed in our former brief, and is this: The lines of the District are shown on the map, page 2½, and the evidence proved that the physical conditions on either side of the improved road are similar, and the physical conditions southeast of Plummerville were the same as at an equi-distance southwest thereof (R. p. 2.)

Turning to the map it is seen that at Plummerville, the southern terminus of the road, the District extends 1½ miles west and 7½ miles east. At a point two miles north of Plummerville the District only extends a half mile west and 7 miles east of the road. Turning to the southwest, which is physically the same as the southeast, it is found that section 24 only is included, corresponding to section 20 on the southeast; while sections 21, 22, 23 and 24, containing plaintiff's lands, are included on the southeast, and no corresponding sections to them on the southwest. The contention being that

such a district obviously excluding large areas of benefited land and capriciously including as benefited tracts manifestly less benefited than the excluded tracts, is void.

Counsel liken the form of the District to the letter "E" (Brief p. 2) and argue that because there are laterals running east, and none west, that the District naturally extends further east than west; but the facts do not back the argument.

Evidently reference is made to the lateral running East two miles north of Plummerville (whether the prongs on the north end of the road are laterals, or main lines, makes no difference as they are too remote from this property to have any effect.)

It will be noted that the nearest point of plaintiff's land to that lateral is more than 2½ miles, and the greater part of her land considerably further than that from the lateral; whereas the land on the west running from a half mile to a mile and a half of the main road from Plummerville north is excluded. In other words, the benefit from the lateral extended to wider territory than the benefit from the main road. Moreover, between this lateral and the plaintiff's land lie the railroad, and the improved road in District No. 2, which carries all traffic into Plummerville and from Plummerville north to the lateral, in order to reach it (R. pp. 11 and 15.) Hence the lateral cannot be a diffusing point of benefit.

The Act is sought to be sustained through section 7 of it, which is set out in defendant's brief (pp. 2, 3.)

The Supreme Court sustained the Act against this charge by reason of said section, and said that the remedy for property owners was not to impeach the validity of the District on account of the exclusion of benefited land, but to move the inclusion of them (R. p. 30.)

Had the Act been attacked in advance of the assesments being levied on account of benefited lands being arbitrarily excluded, then the court might well have answered that the property owners had not shown injury, because it would be presumed that the Commissioners would, under section 17, include benefited lands, so as to reduce the plaintiff's assessments by their inclusion as the Act authorized them to do. But a far different situation is presented where the Commissioners have not done so, but have levied assessments for

20 years on the plaintiff's land and did not include large areas of benefited land much nearer to the road than her land.

There are two things apparent from the terms of the Act:

FIRST: The benefited land not included in the boundaries must be added before the assessments are levied. Section 16 provides for filing plans of the improvement with the county clerk; section 18 provides for notice of hearing on these plans; section 19 provides for the court to consider the plans, change or modify them. Then follows section 20 providing that after the approval of plans the Commissioners shall proceed to make the benefit assessments. Thus it is seen that section 17 is injected in these provisions and it stands alone.

Section 20 following these provisions, and from its context also, shows that the assessments are only to be made after the plans and boundaries are fixed. Clearly there is no authority in the Act to make assessments for 20 years and then turn around and upset them by re-creating the District, certainly not after bonds are issued.

Section 28 provides that these assessments shall be a first lien, prior to mortgages and all other liens, and section 34 provides that the bond-holders may have a receiver appointed to collect the assessments when they are not paid.

Thus the property owner is put in this position:

He has a first mortgage on his property for 20 years and the right of the holder of the mortgage to have a receiver appointed, if he does not pay his assessment, and yet it is said that he should move to have the benefited land not in the District brought into the District, instead of attacking his assessment, which is based upon an arbitrary drawing of lines excluding benefited lands.

In Myles Salt Co., v. Board of Commissioners, 239 U. S., 478, the court said: "It is true the law of the State as written is not attacked, but the law as administered and justified by the supreme court of the State is attacked."

SECOND: It is also clear that under section 17 no one is authorized to move for the including of excluded lands except the Commissioners. It makes such proceedings depend upon the Commissioners finding lands beyond the boundaries of the District will be benefited by making the improvement,

and the Commissioners shall, when they so find, make a report of the same to the county court, and then the proceedings is begun with notice to affected property owners.

There is no statutory authority for anyone, other than the Commissioners, taking this action and their finding of fact is the predicate of it.

Therefore, when they do not act under this section, but levy an assessment for 20 years based on the lines of the District as drawn by the Legislature, they confirm the arbitrary action of the Legislature. It will not do to say that because they are given power to cure that arbitrary action of the Legislature that the Act can be saved by this power being given when the Commissioners do not exercise it; or rather failed to exercise it at the only time when they could validly do it, that is, prior to the levying of the assessments.

This is an attack on the assessments as levied under the Act; and it is proved that the lines of the District as drawn by the Legislature are arbitrary and exclude benefited lands, to the detriment of the plaintiff, and that these assessments stand for 20 years; hence section 17 "makes the promise to the ear and breaks it to the hope."

(b) The other contention that the Act is arbitrary rests on the proved and accepted fact that plaintiff's lands in sections 21 and 22 are separated from the improved road in the District, so that it is necessary to go out of the District over land nearer to the improved road than said sections to reach the road: in other words, excluded lands between these sections and the road are necessarily benefited, and are excluded, while the plaintiff's land in said sections, if benefited at all, are necessarily less benefited than the excluded lands through which it is necessary to go from her lands to reach the improved road.

It is said that because there is a small creek and a marsh separating some of plaintiff's land from the highway and making access to it difficult, that the plaintiff contended that the Act creating the District is a nullity (Brief p. 6.)

The facts do not sustain the statement. The record shows that the plaintiff's testimony was to the effect that her lands in section 21 and 22 were separated from the improved road by Gap Creek, and cypress brakes and swamp,

and that the only practical route of travel from said sections was to pass without the District and go south into section 28 and there strike the road to Plummerville, going through sections 29 and 30, and said sections 28, 29 and 30 are out of the District.

Then a similar statement is made relating to the road from the east end of her property (R. p. 2.) There was evidence that there is no feasible or practical route, owing to the topography of the land and the physical condition of the brakes and swamps, to reach the road to Plummerville from sections 21 and 22, without excessive expense in bridging and constructing an embankment, other than through the routes described.

While there was some testimony by the District tending to controvert this testimony, yet it was disregarded by the court (R. pp. 2, 3.) The majority opinion states:

"Appellant alleged and made proof that on account of Gap Creek and cypress brakes, the only practical route from said lands in section 21 to the improved roads in said District is to cross the south boundary line thereof and pass over lands not included in the district, and a part of which was nearer the improved road than appellant's lands." (R. p. 3.)

The majority as well as the minority of the court having accepted this testimony, it is an established fact in this court that the only practical route from plaintiff's land to the improved road is to cross the south boundary of the District and pass over lands not included in the District, part of which is nearer the improved road than appellant's land, and this is held not to be an arbitrary act of the Legislature and void as such, because the evidence thereof is not that class of evidence of which the court takes judicial cognizance. (R. pp. 31, 32.)

The court had in Ruddell v. Rutherford, 145 Ark., 49, held that a similar condition rendered an Act void as an arbitrary exercise of the legislative power; and this opinion approves that decision, but draws a distinction between it and this case in that the impasse in that case was an island and a navigable stream, of which the court took judicial notice, whereas the impasse in this case was proved by parol testimony, which the court accepted as true. Therefore, the real

question on this issue is whether an arbitrary exercise of the legislative power has to be shown on the face of the Act itself, or in evidence of which the court takes judicial cognizance before relief to the taxpayer can be given.

In Myles Salt Co., v. Board of Commissioners, etc., 239 Ark., 478, the invalidating facts there appeared in the allegations of the complaint which from their nature must have been proved by parol testimony explaining the physical condition of Weeks' Island and the surrounding country; just as the physical condition was alleged and proved here.

The approval of the position of the Supreme Court of Arkansas on this question necessarily calls for this Court over-ruling its decision in the Myles Salt Company case.

In our brief beginning at page 14 we cited numerous cases from the Supreme Court of Arkansas where that court had prior to the decision in this case, declared unconstitutional acts of the Legislature where the invalidating facts were clearly and satisfactorily proved to the court, regardless of the class of evidence which convinced the court. In none of them did the court limit itself to the face of the Act or matters of which it took judicial cognizance. But now a new doctrine is announced, and as we view it, this new doctrine is contrary to the decisions of this Court and the previous decisions of the Supreme Court of Arkanasas, which we have heretofore cited at pages 14-18 of our brief.

NO BENEFITS RECEIVED

This case differs from the No. 2 case in that there is no allegation in that case that there is no benefit to the plaintiff's land by virtue of the improvement of the road. The allegation there is that the assessment is excessive, discriminatory and confiscatory, and in this case the same allegations are made as to the assessments being excessive and discriminatory, and the additional allegation is made that the improvement of the roads in the No. 5 District would be no benefit whatever to the plaintiff's land. This is not made as a generality, but the facts inducing this conclusion are stated in full.

The complaint (R. p. 11) sets out in detail the improvement contemplated and the relation of the plaintiff's land to

the roads being improved, and alleges that from the town of Plummerville, which is the southern terminus of the road, the road runs north into a hill country with which there is no trade or other relation with the cotton country south of the railroad and south of the improved road in the No. 2 District, either in the present or future uses of the plaintiff's lands, and the road diverts travel away from plaintiff's lands and only improves the country it traverses and serves.

In an amendment to the complaint (R. p. 14) further facts regarding the situation are alleged. The plaintiff took evidence sustaining her allegations, but it was excluded and a demurrer to all of the allegations in the complaint and amendments alleging that there were no benefits to the land, sustained.

Counsel seek to sustain this action on the same ground which they seek to sustain the action in the No. 2 case, that is, that 18 days constructive notice of the hearing constituted due process, and that the 10 days provided in the statute for bringing suit after that hearing was a valid limitation which prevents any other suit being brought, notwithstanding there was no benefits and notwithstanding the assessments are confiscatory.

Counsel rely upon the same cases here which they do in the No. 2 case, to-wit: Milheim v. Moffat Tunnel, Imp. Dist., 262 U. S., 710; Farncomb v. Denver, 252 U. S., 7, and Campbell v. City of Olney, 262 U. S., 352.

We have in our reply brief in the No. 2 case at pp. 9, 10 and 17 discussed these cases, and it is thought demonstrated that none of them support the contention made by counsel, as none of them went to this issue.

This is the concrete situation resting upon this theory of the defendant: In the No. 2 case there is an assessment including interest, of $30,323.00 levied on the plaintiff's entire farm, and in the No. 5 case an assessment of $18,936.00 levied on 960 acres of it (R. p. 4), total assessments of $49,259.00.

The admitted facts are that the $30,000.00 assessment is discriminatory and confiscatory and that the $18,000.00 assessment is for the improvement of a road which confers no benefit whatsoever to the 960 acres against which it is levied.

It is sought to sustain these impositions on a constructive notice published for two weeks, calling for a hearing 18 days from the date the notice is signed; during which time the plaintiff was in Washington City—fully 1000 miles away from the property, and without information whatever of the creation of the District, the proceedings against her lands, and the levying of the assessments until some five or six months after they were levied. And it is broadly contended because the creating Act, which was a Special Act, unpublished and unknown generally to the community, passed without previous notice having been given of the intention to introduce it, as required by the Constitution, provided that all actions to attack the assessments must be brought within 10 days after the hearing (notice of the hearing only was given—not of the right of action) and that the 10 days' limitation having expired, no other action can be brought to afford relief against admittedly confiscatory assessments.

We have in our first brief set out at pp. 10 and 11 the authorities that we rely upon to sustain an independent action for relief under such circumstances and will not burden this brief with repeating them.

But we desire to especially call attention to one paragraph in Myles Salt Co., v. Board of Commissioners, 239 U. S., 478, as follows:

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not, and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation."

It was said in an independent suit brought long after the District was created and long after the assessments were levied; and an injunction was sustained against assessments levied against un-benefited property within such a District.

At page 14 of the brief there is a quotation from Branson v. Bush, 251 U. S., 215, to this effect: "No agency for such development equals that of good roads." This quotation is misleadingly applied. It is found in the following paragraph: "To this must be added the obvious fact that anything that develops the territory which a railroad serves must neces-

sarily be of benefit to it, and that no agency for such development equals that of good roads."

That a railroad was benefited by the development of the country which it served and that no agency for such development equals that of good roads is no justification for a benefit to be ascribed to the plaintiff's land for roads which serve another section of the county, the nearest point on the road being from two to five miles distant from her land, and which do not develop her land at all, and which roads do not serve her land in any particular. In fact, it is incredible to assume that good roads could in any way benefit lands submerged in bayous and lakes and adorned with cypress brakes, and hence no presumption can be indulged that there is benefit to the major part of plaintiff's land by grading and macadamizing these roads.

Counsel (Brief p. 15) conclude the argument on this issue as follows: "The plaintiff may yet live to bless an enterprise that must in the end enormously enhance the value of her property." The plaintiff must spend $49,000.00 to get this enormous enhancement of her $30,000.00 farm. The blessings of such expenditure can be supported by the highest authority, which counsel do not cite, but which is Acts, ch. 20, v. 35, wherein it is written: "It is more blessed to give than to receive."

Respectfully submitted,

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Attorneys for Plaintiff in Error.

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WM. R. STANSBU
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IN THE

United States Supreme Court

MRS. M. L. HOUSE ..... *Plaintiff in Error.*

v. No. 93 October Term, 1923.

ROAD IMPROVEMENT DISTRICT NO. 5 OF CONWAY COUNTY, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

W. P. Strait,
G. B. Rose,
D. H. Cantrell,
J. F. Loughborough,
A. W. Dobyns,
For Defendant in Error.

IN THE

United States Supreme Court

MRS. M. L. HOUSE.....*Plaintiff in Error,*

v. No. 384 of October Term, 1923.

ROAD IMPROVEMENT DISTRICT NO. 5
OF CONWAY COUNTY...*Defendant in Error.*

IN ERROR TO THE SUPREME COURT
OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Substantially all the questions presented in this case are presented in the case of the same plaintiff in error, hereinafter called the plaintiff, against Road Improvement District No. 2 of Conway County; and, like counsel for the plaintiff, we beg that our brief in that case may be considered by the court in passing upon this. The few questions that remain will require only brief discussion. And again we say that if the court will read the very convincing opinion of

the Supreme Court of Arkansas, which is well printed in 158 Ark. 357, it will probably feel no need of reading this brief.

DISTRICT NOT VOID BECAUSE MORE LAND TO EAST OF MAIN ROAD THAN TO WEST.

Counsel say that the district is void because there is more land in the district to the east of the main road than there is to the west.

The road system of the district is roughly like a letter "E." The main road runs to the northeast. From this there branch two laterals, running east to the boundaries of the district. No laterals leave the main road to the west. The district therefore naturally extends further in an easterly than in a westerly direction. Had it not done so, those on the west would have had legitimate ground to complain.

Moreover, the act contains this provision (Arkansas Road Acts of 1919, Vol. I, p. 1037):

"Section 17. If after the plans have been approved by the county court, the commissioners find that lands beyond the boundaries of the district will be benefited by making the improvements, they shall specially report the same to the county court by filing with the clerk of said county a list of said lands, and thereupon the said clerk shall designate a date of hearing thereon by the county court, and shall

cause to be published once a week for two weeks, in some newspaper published in the county, a notice, which may be in the following form:

" 'Notice is hereby given that there has been filed in my office a report of the commissioners for Road Improvement District Number ....., praying that the boundaries of said district be extended to include the following described lands in the district:

"(Here describe the lands).

"All persons having any interest in any of such lands are notified that the county court of Conway County, will hear said report on the ..... day of ....., and that they may be heard for or against the inclusion of any of said lands in said district at that time."

"The last insertion of said notice to be not less than ten days before the date of the hearing. At the hearing aforesaid the court shall consider the report and hear any parties interested therein; and if it finds that any of the lands in said report will be benefited by the making of the improvements in the district, it shall make an order which shall have the force and effect of a judgment, extending the boundaries of the district to include the benefited lands. From this order an appeal may be taken within ten days, and not thereafter."

It is the established law in Arkansas, and we submit that it should be the established law everywhere where such a provision exists, that he who thinks that he is suffering injustice because lands which will be benefited are omitted from the district should seek his remedy by having the omitted lands brought in, and not by striking down the instrumentality for a necessary public improvement.

Thus, in *Hill* v. *Echols,* 140 Ark. 474, it was held:

"Act 402 of 1919, creating a road district in Woodruff County, failed to include certain lands in the town of Cotton Plant, but provided that the commissioners could include such lands if they thought proper. *Held,* the provision did not invalidate the statute."

And in *Neterer* v. *Dickinson & Watkins,* 153 Ark. 10, the court said:

"Moreover, there is a provision in the statute creating this district authorizing the taxation of omitted lands which may be subsequently found to be benefited by the improvement. This provision eliminates any discriminatory effect of mistake of the lawmakers in omitting benefited tracts from the district, for this provision of the statute constitutes authority to put them in the district and assess them if subsequently found to be benefited."

The same rule was laid down by the Arkansas Supreme Court in this case. In 158 Ark. 360, it says:

"In the first place, section 17 of the act creating the district authorized the county court, upon notice and hearing, to extend the boundaries of the district so as to include any lands benefited by the improvement. The purpose of including a flexible provision of this kind in the act was to preserve its validity in case a demonstrable mistake was made by the legislature in establishing the boundary lines so as to exclude lands benefited by the improvement. The remedy of the property owners was not to impeach the validity of the district on account of exclusion of benefited lands, but to move the inclusion of them."

In so holding, the court below did not discriminate against the plaintiff, but merely applied to her case an enlightened rule well established in the jurisprudence of the State.

It could easily be demonstrated that the district is laid off in a logical manner, so as to embrace those lands that are specially benefited; but in view of the fact that the plaintiff has in her own hands the means of remedying any injustice without destroying the district, we deem it unnecessary to pursue the matter further.

DISTRICT NOT VOID BECAUSE A SMALL CREEK AND MARSHES INTERVENE BETWEEN SOME OF PLAINTIFF'S LANDS AND THE ROAD.

In some cases in Arkansas cited by counsel for the plaintiff it has been held that a district composed of a main body of land and of a disconnected tract were void, because the intervening lands must have been benefited as much as the disconnected tract, and in those cases the statute provided no way to bring the latter in.

On the faith of those decisions counsel contend that because there is a small creek and a marsh separating some of plaintiff's lands from the highway and making access to it difficult, the act creating the district is a nullity. If that be true, the number of improvement districts that will survive the scrutiny of this court will be negligible. In nearly every district there is a range of hills, a marsh or a small stream that prevents easy access to the improvement from some of the lands. The case here is like that presented in *Wilkinson* v. *St. Francis County Road Improvement District,* 141 Ark. 164, where the court say, on page 169:

"There is testimony that much of the land owned by appellant received an assessment greater than its present market value. These were lands shown to be of small value chiefly

because of the recurring overflows from the L'Anguille river, which winds its tortuous course through them. It is not shown or contended that these lands are beyond reclamation by drainage or by levees, and it is a matter of such common knowledge that courts may know it that levees and drains have passed beyond the experimental stage."

There may be streams or marshes so large that they would prevent the formation of a local improvement district embracing lands on both sides. It is hard to imagine an improvement east of the Mississippi or the Hudson that would benefit lands on the west, or one north of the Everglades that would benefit lands on the south. But small streams can be bridged and small marshes drained or circumnavigated. Nowhere are such impediments fatal to an improvement district. Certainly counsel cite no authorities to justify their contention.

In Arkansas the matter has been repeatedly adjudicated.

In *Sadler* v. *McMurtry,* 152 Ark. 621, the lands in question were separated from the road by Saline River, which, though small, is large enough to appear on any map of the State, and by Big Creek; and it was held that they were properly included in the district.

In *Rogers* v. *Arkansas & Louisiana High-*

way Dist., 139 Ark. 322, a drainage ditch 36 feet in width lay between the lands and the highroad, and this was held to be no impediment.

In *Sayle* v. *Road Improvement District No. 16 of Woodruff County*, 246 S. W. 843, it was held:

"That a road improvement district, as laid out by a special statute, included lands separted by a stream or body of water from the area which was contiguous to and might be benefited by the improvement, did not make the inclusion of such lands arbitrary; for, while subject to overflow, they were valuable for grazing and accessible from the road by a ferry and a bridge."

If every district is void where the property owner must bridge a small creek or drain a marsh before he will have direct access to the highway, local improvements must come to an end.

The court below announces the rule to which it has always adhered, and which, so far as we know is universal, that parol evidence will not be admitted to overturn a statute. Such evidence may be received to take a case out of the operation of a statute, but not to strike the statute down. If it were, there could never be any certainty in the law. The evidence in one case would establish the statute, in the next case

it would overthrow it; so that, in the language of Mr. Justice Black, the law would be no more certain than the terms of a horse trade.

That parol evidence cannot be admitted to invalidate a statute has long been the law in Arkansas.

> *Mechanics Building & Loan Ass'n* v. *Coffman,* 110 Ark. 269.
>
> *Niven* v. *Road Impt. District No. 14,* 132 Ark. 240.
>
> *Arkansas Fair Ass'n* v. *Hodges,* 120 Ark. 138.
>
> *Green County* v. *Clay County,* 135 Ark. 301.
>
> *Helena Water Co.* v. *Helena,* 140 Ark. 603.

Therefore the court below properly held that in determining the validity of a statute it could consider only those matters of which it could take judicial cognizance. It could not take judicial cognizance of a petty creek or an insignificant marsh lying between lands of the plaintiff and the road, and therefore declare the statute void because of their existence.

Consider for a moment the result of a contrary ruling. Neither the bondholders nor any other propety owner in the district would be

bound by the decision in this case. Each of them could bring a suit, in which it might be proved that this insignficant creek and this marsh created no serious impediment to access to the road from plaintiff's lands, or that it did create such an impediment; and so the statute would be alternately sustained and overthrown. Existence under conditions of such uncertainty would be intolerable. The only way to avoid so miserable a condition of things is to make the validity of the statute depend on those things of which the courts take judicial notice. Thus a permanent rule can be established.

This rule was laid down in Arkansas as long ago as 1873, when, in the case of the *State* v. *Dorsey County,* 28 Ark. 378, the court held:

"When the constitutionality of an act of the legislature, creating a new county, is questioned because its area is less than the constitutional requirement, or that some county or counties out of which it has been organized has been reduced below six hundred square miles, to determine this fact, the courts cannot look beyond the act itself, or some other official record of like grade and character, or official survey or maps of which they are bound to take judicial notice."

So in *Greene County* v. *Clay County,* 135 Ark. 302, the court held:

"Acts 1895, page 244, detaching a township from Greene County and attaching it to Clay County, cannot be held unconstitutional as reducing Greene County below the constitutional limit of six hundred square miles, inasmuch as the public surveys in existence at the time of passage of such act did not show the area of Greene County, the rule being that when there is a question of fact to be ascertained by the legislature outside of those matters of which both courts and lawmakers must take cognizance, the courts cannot inquire into those facts for the purpose of overturning legislation."

We cannot believe that this court will deny to the Supreme Court of Arkansas the right to determine the character of evidence admissible in an attack upon the statutes of that state, particularly as this court has adopted the same rule of excluding parol evidence to vitiate an act of Congress.

In *U. S.* v. *Ballin,* 144 U. S. 1, 4, this court says:

"It cannot be that we can refer to the journal for the purpose of impeaching a statute properly authenticated and approved, and then supplement and strengthen that impeachment by parol evidence that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force

to the impeachment. If it be suggested that the Speaker might have made a mistake as to some one or more of these seventy-four members, or that the clerk may have falsified the journal in entering therein a record of their presence, it is equally possible that in reference to a roll-call and the yeas and nays there should be a like mistake or falsification. The possibility of such inaccuracy or falsehood only suggests the unreliability of the evidence and the danger of appealing to it to overthrow that furnished by the bill enrolled and authenticated by the signatures of the presiding officers of the two houses and the President of the United States."

Indeed, this court goes further than the Supreme Court of Arkansas, and will not even look at the journals of Congress when a statute is assailed.

Field v. *Clark*, 143 U. S. 649.

Lyons v. *Woods*, 153 U. S. 649.

Chesapeake & Potomac Tel. Co. v. *Manning*, 186 U. S. 245.

Harwood v. *Wentworth*, 162 U. S. 547.

Flint v. *Stone Tracy Co.*, 220 U. S. 143.

PLAINTIFF'S ASSESSMENT NOT NOW OPEN TO QUESTION.

Counsel say that this case differs from the plaintiff's case against Road Improvement District No. 2 of Conway County in this, that in that case the plaintiff admitted that some benefits accrued to her lands, while here she says that no benefits at all will result.

But, as is shown in that case, the one inquiry is as much precluded as the other by the plaintiff's failure to avail herself of the statutory method of correcting her assessment. Whether her lands were benefited at all, and if so, to what extent, was the question to be decided at the hearing of which plaintiff was duly warned by publication. She neither appeared then nor brought suit within the statutory period to review the finding of the commissioners; and under the decisions of this court in *Milheim* v. *Moffat Tunnel Improvement District,* 262 U. S. 723, *Farncomb* v. *Denver,* 252 U. S. 7, and *Campbell* v. *Olney,* 262 U. S. 352, and under the decision of the Supreme Court of Arkansas in *Bush* v. *Delta Road Improvement District,* 141 Ark. 254, it is now too late to claim that her lands will derive no benefit from the road.

If the matter were open to investigation, there is evidently no merit in the plaintiff's

claim. She admits that she will be benefited by the road of District No. 2 going east and west; but she says that she would not be benefited by a road running to the northeast. Perhaps she would never want to travel that road; but that is not the question. The question is, would such a road enhance the value of her lands.

As was said in *Rogers* v. *Highway Improvement District,* 139 Ark. 322, 325:

"The question is not what the usable value of a road is to a particular tract of land, but to what extent has the improvement enhanced the value of the land. It is against this enhanced value or betterment that the tax is levied to pay for the construction of the improvement which is to bring about the enhanced value. One owner of land might use a road which neither his predecessor nor successor in title would use. But it appears fair and reasonable to say that land must necessarily be benefited or enhanced in value by having an improved road constructed in such proximity that the landowner may use the road if he desires to do so."

In *Branson* v. *Bush,* 251 U. S. 191, this court well says, "No agency for such development

equals that of good roads;" and the plaintiff may yet live to bless an enterprise that must in the end enormously enhance the value of her property.

Respectfully submitted,

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For Defendant in Error.

Office Supreme Court
FILED
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WM. R. STAN

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 93.

MRS. M. L. HOUSE, PLAINTIFF IN ERROR,

vs.

ROAD IMPROVEMENT DISTRICT No. 5 OF CONWAY COUNTY ET AL., DEFENDANTS IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

The original briefs assume that there lay between plaintiff's lands and the road to be improved a little creek and a small swamp, compelling her to go outside the district to reach the road until the creek should be bridged and the swamp drained. In point of fact the testimony on this point was conflicting, and the finding of the trial court was against the plaintiff on that issue. The Supreme Court of Arkansas did not question the correctness of that finding, but merely decided that upon the facts as claimed by the plaintiff the

district was valid, because the court could not take judicial notice of these trifling obstructions. See the language of the agreed stipulation (Tr., 2 and 3), where, after setting out the testimony for the plaintiff, the stipulation proceeds:

> "That testimony was introduced by defendant district tending to controvert the testimony offered by appellant on this issue, and that the Chancellor decided this issue in favor of the district."

That issue is therefore not before the court.

Respectfully,

W. P. STRAIT.
G. B. ROSE.
D. H. CANTRELL.
J. F. LOUGHBOROUGH.
A. W. DOBYNS.

THESE were two suits to enjoin collection of special road taxes assessed on plaintiff's lands in Arkansas. Plaintiff prosecutes error to the decrees of the Supreme Court of that State affirming the decrees of the Chancery Court of Conway County, which denied her the relief prayed.

Mr. Joseph M. Hill, with whom *Mr. Henry L. Fitzhugh* was on the brief, for plaintiff in error.

Mr. G. B. Rose and *Mr. Lasker Ehrman*, with whom *Mr. Chas. T. Coleman*, *Mr. D. H. Cantrell*, *Mr. J. F. Loughborough* and *Mr. A. W. Dobyns* were on the briefs, for defendants in error in No. 92.

Mr. G. B. Rose, with whom *Mr. W. P. Strait*, *Mr. D. H. Cantrell*, *Mr. J. F. Loughborough* and *Mr. A. W. Dobyns* were on the briefs, for defendants in error in No. 93.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Both of these writs must be dismissed.

No. 92.

The only ground suggested to sustain the writ in this cause is that Act No. 245, Arkansas Legislature, 1919, which established Road District No. 2 of Conway County, was duly challenged as repugnant to the Fourteenth Amendment. Such a challenge must be distinct and substantial.

The act undertook to create the district with boundaries which include plaintiff's lands and specified the proceedings for assessing benefits to meet necessary costs. Her lands were assessed as provided. Some months thereafter, by a bill in equity, she claimed insufficient notice and asked relief from both assessment and consequent

penalties; also that the commissioners' plans should be declared null and she be heard as to the merits of any assessment. She offered to pay any sum the court might find just and equitable.

The bill alleges that the statute authorized and the commissioners gave only seventeen days' notice of the assessment, by publication, that she had no actual notice, and that the publication failed sufficiently to describe her lands. For these reasons she maintained the act did not provide due process of law and violated the Fourteenth Amendment.

The Supreme Court, having considered the objections, held that the statute allowed twenty-eight days after the first publication during which time petitioner might have objected to the assessment, and declared this was adequate; also that when read in connection with the statute the notice sufficiently described the lands. Plaintiff in error now insists that the act is null because it prescribes insufficient notice and description of the assessed lands.

Accepting the statute as construed by the state court, the suggested objections to its validity appear to us wholly wanting in merit.

No. 93.

This cause grew out of the creation of District No. 5, Conway County, by Act No. 245, and assessment for benefits thereunder. With one exception the questions now raised are the same as those in cause No. 92. As an additional ground for challenging the statute plaintiff in error claims that it is arbitrary and beyond the power of the Legislature because the proposed improvement could not benefit plaintiff's lands, while other lands actually benefited were not included. The record does not show that this objection was placed upon any federal ground in the courts below; but, assuming that the point was properly made, we think it is clearly without merit.

Houck v. *Little River Drainage District*, 239 U. S. 254, 265; *Miller & Lux* v. *Sacramento Drainage District*, 256 U. S. 129, 130; *Valley Farms Co.* v. *Westchester*, 261 U. S. 155, 163, 164.

Writs of Error Dismissed.

HOUSE *v.* ROAD IMPROVEMENT DISTRICT NO. 2, OF CONWAY COUNTY, ARKANSAS, ET AL.

HOUSE *v.* ROAD IMPROVEMENT DISTRICT NO. 5, OF CONWAY COUNTY, ARKANSAS, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

Nos. 92 and 93. Argued October 17, 20, 1924.—Decided November 17, 1924.

1. Where the decision of a State Supreme Court construed a road district statute as allowing twenty-eight days' notice by publication to land owners of proceedings to assess for benefits and adjudged that the notice published, read with the statute, sufficiently described the lands affected, *held*, that contentions that the statute did not provide due process of law were too insubstantial to support a writ of error. P. 176.
2. The objection that a statute assessing lands for a road improvement is arbitrary and void as to plaintiff because the improvement could not benefit his lands while other lands actually benefited were not included in the district assessed, *held* clearly without merit. P. 177.

Writs of error to review 158 Ark. 330, 357, dismissed.